United States Court of Appeals for the Second Circuit



APPENDIX

ORIGINAL

75-7318

United States Court of Appeals

FOR THE SECOND CIRCUIT

DOMINICK PAMPILLONIA.

Plaintif

vs.

CONCORD LINE, A/S,
Defendant and Third Party Plaintiff-Appellee,

US.

COURT CARPENTRY AND MARINE CONTRACTING CO.,

Third-Party Defendant-Appellant,

and

INTERNATIONAL TERMINAL OPERATING CO., INC., Third-Party Defendant.

JOINT APPENDIX

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	1C 799 TOWNSON BAMPILLONIA V. CONCORD LINE		
DAYS	FILINGS- PROCE, 2-GS	REPORTE EMOLUM RETUR	ENT NS
6/30/71	Complaint Filed. Summons Issued.	1	135
7-21-71	Summons returned and filed/executed	2	
8/30/71	Supplemental summons issued. Supplemental summons returned & filed/executed (COLOMBUS)	13	
	ANSWER of deft filed.	4	
1-27-72	Deft's interrogatories to pltff filed.	. 5 .	1
1-27-72	peft's notice to take the deposition of pltff on 2-28-72 filed	-	-
1-27-72			-
	pltff's interrogatories to deft filed.	7	1
2-25-72	Pltff's cross-notice to take the deposition of deft on	8	-
	3-10-72 filed,		-
2329-72	By MISHLER, J. Order filed that the application for leave to		
1 - 1 - 1 - 1 - 1 - 1 - 1 - 1 - 1 - 1 -	implead Court Carpentry & Marine Contracting Co. and Internati		26.
E- :	Operating Co is granted. (P/C mailed to attys)	9	-
3/17/72	Third-Party Complaint filed, Third Party Summons issued.	10	
2/28/72	Third-Party Summons returned and filed/executed. (both defts)	11	12.
5/15/72	Deft's interrogatories to 3rd-party deft COURT CARPENTRY filed	12	-
5/15/72	Deft's interrogatories to 3rd-party deft INTERNATIONAL TERMINAL	• •	_
1	filed.	13.	
5/18/72	Third-party answer with cross-claim & counterclaim filed.	-	1
198	(C.C. LUMBER INC'.)	14	- 12
5/18/72	Third-party deft's (C.C. LUMBER INC.) notice to take deposition		13,3
2	of deft filed.	15	- 4.
5/23/72	Deft's reply to third-party deft's (C.C. LUMBER) counterclaim		
300	filed.	16	100
6/5/72	Third-party deft's (C.C. LUMBER) interrogatories to third-		3.3
£.	party pltff filed.	.17 -	1
6-5-72	Deft/third party pltff's notice to take the deposition of		
7	third party deft Court Carpentry etc on 6-22-72 filed.	18:	
6-5-72	deft/third party pltff's notice to take the deposition of thir	1	
Ž.	party deft International Terminal on 6-22-72 filed.	19	1
6-6-72	Stipulation filed extending time for deft to answer interrogato	ries	13
2	by pitff to 6-19-72.	20	7
6/13/72	3rd-party deft's (C.C. LUMBER) interrrogatories to3rd-party		-
	deft INTERNATIONAL TERMINAL filed. q	21	-
5/16/72	Third-party deft's (INTERNATIONAL TERMINAL) reply to		-
1	third-party deft's (C.C. LUMBER) cross-claim filed.	22	9
5/16/72	Third-partyanswer & jury demand filed. (INTERNATIONAL TERMINAL)	23	-
7.		23	-

Docket Entries

Fg. 3 710799 POMINICK PAMPILLONIA v. CONCORD LINE, etal

		c	LEA	C'S FEES		AMO	THU
DATE	FILINGS-PROCEEDINGS	PLAINT	-	DEFE	HOANT	EMOLU	TED
6/16/77	Third nave doft to (TUMEDINAMIONAL MORNING		r-	+	· T -	-	
6/16/72		ice	0	take		1	-
P	deposition of pltff, deft & third-party deft	COUR	r c	ARPE	TRY	-=-	-
75	Before Mishler, Ch.JCase called-Not ready for		-	-	+-	24	+
6/16/72			-	-	-	-	1
8/1/72	Third-party deft's answers to third-party pltff	8		-	_		1
	interrogatories filed,			-	1		25
8-11-72	Stipulation filed extending time for deft to an	swer		-	1		J_
	interrogatories by pltff filed.				1.	26	
12/4/72	Before Mishler, ChJ-Case called-Not ready for tr	ial					T
3/23/73	Notice to take deposition of 3rd party deft (Cou	rtC	Car	pent	4)		1
	filed.				T	26	T
10-18-73	Notice of motion for an order sett the the above	act	ion	for	1	26	+
`	trial on 12-4-73, ret 10-26-73 file 4.			1	+-	27	+
10-26-73	Before MISHIER, CH. J. Case called-Metion argued-	12-	3-7	*	+-		+
	for trial		•	1	+-		+
2-3-73	Before MISHLFR, CH.J Case called. Trial order	ed a	nd	-	+-		+
	begun, Ad'1 to 12-10-73.			!	+-	·	+
2/6/83	Preliminary request to charge jury filed.	-		+	+	28	+
XXXXXXX	By.			-	-	20	1
2-10-73	Por one MICHIED ON Y Come and and Michiel	-		-	+-		1.3
2-10-13	Before MISHIER, CH. J Case called. Trial res		•		-		13
352	Caption is amended to read as 3rd party deft. C.C			-	-		1:
2	Lumber CO. Inc. instead of Court Carpentry & Mar	ine		L	1		1
-	Centracting. Trial to be con't on 12-11-73 at		_	-			1:
12-11-73	10:00A.M.			<u> . </u>			Ŀ
	Brief of Raterfront Commission in support of no	tion	t				
	quash subpoena duces tecum filed.					29	Г
12-13-73	Before MTSHLFR. CH.J Case called. Trial res	sumed					,
	Trial to be contd, on 12-12-73 at 10 A.M.						T
12-12-73	Before MISHLER, CH. J Case called. Trial resu	med.	Pl	tff			T
	rests. Motion by all defts to dismiss complaint	is	der	led.			T
	Motion by deft Concord to dismiss claim of negli	gence	e.(rant	ed.		t
	Trial to be continued on 12-13-73 at 10 A.H.		-	_	1	-	+
12-13-73	Before HICHLER, CH. JCase called. Trial res			h-	1-1		+
	consentof deft Concord, the claim over as to de	E. T	T	On_	1		1
	discontinued. Trial cont's to 12-17-73 at 10 a	11-4	1.	0. 19	1-1		+
12-17-73	Before MISHLER, CH. J Case called. Tria. re	m	,	Ten	 i		1
20	jurors present. Both sides rest on the main c	Sume	-6		120	-	-
	against the deft Concord Line. Motions renewe	42616	J L	rue 1	1111	I I	13

Δ 3

Docket Entries

	7 FILINGS-PROCFEDINGS	CLERK'S PERS				AMOUNT REPORTED IN		
DAYE	FILINGS-PROCEEDINGS	PLAINT	-	BEFEND	мт	RETUR	ENT	
-	to dismiss the complaint, etc. is denied. Tria	1 to	res	ume d	n	<u> </u>		
	12-18-73 at 10 am.							
2-19-7	By MISHLER, Cli. J Order of sustenance dtd 12	-17-	7	iled			30	
2/18/73	Before MISHLER, CH.J Case colled- Trial re-						30	
1-20/13	At 11:55 A.M. the jury retd for deliberation			P.M	th		—	
-	jury retd and rendered a verdict in favor of	-	-		-			
	against the delt Concord Line in the Sum of							
	polled-Jury discharged-Court ordered the jury	ver	dic	sig	ned		1.	
	by foreman be filed-The claim over between *	e 3r	d n	rtv	11-	F		
No.	Concerd Line and the 3rd party deft C.C. Limit		_		-	1		
300 A	ordered and begin-Notion by the 3rd party pl				ct	d.	-	
31. 1	verdict -Decision reserved-Motion by the 3rd						-	
	directed verdict -Decision reserved- Trial co		1	1	1		1	
	reserved on the claim over the entry of judge	-	+	+	120	-		
	case is withheld until the 3rd parties claim				1	-	1	
	the court	15 0	FCI	dea b	1	-		
		12/11	173	£1.	4	-	1	
_/18/7			//-	11.0	-	-	31	
2/18/71			1	 	+.	-	132	
-26-73	By MISHLER, CH. J Memorandum of decision dtd							
	directing the Clerk to enter judgment in favor	-	+	-	-	-	plt	
1	deft in the amt of \$30,000. with costs, and in	avo	1 0	thi	na I	arty	3:	
4.	against third party dest in the same art, etc.	-	+-	-	+		+ -	
2-27-73	JUDGHENT dtd 12-27-73 granting judgment in favor							
To.	deft & 3rd-party pltff in the amount of \$80,000							
J\$S	al bursements to be taxed, and in favor of this	rd-pa	rty	pltf	f, a	nd a-	1	
	gainst third-party deft Court Corpentry & Marin	e Co	htr	actin	¢ C	o. In	-	
	the same amount and, in addition thereto, reas	nabl	e c	ourise	11	ees &	-	
-	disbursements filed. (p/c mailed to attys).		1	-	-	-	34	
-25-74	Notice of appear filed. Captionie of action to		to	r of	٨.		120	
		n	3	-	1	-	35	
	Supersedeas bond on appeal filed.	ļ	1	_	1		36	
/26/74			1_	-	1		37	
-8-74	By MISHLER, CH. J Consent order dtd. 4-8-74	tha	t ti	ne mo	t10	to	1	
	amend nunc pro tunc the judgment entered on 12	-27-	73	13 gr	ant	ed.		
	(1/c sulled to attys) 'm		1_				38	
	Satisfaction of Judgment filed.						3	
- 0 7	Appellees cross designation of issues on appeal		1 1		1		40	

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Docket Entries

CIVIL D	CORET 71 C 799 D. PAMPILLONIA VS. COUCORD	Lan L	LERKS	: :==:m.::::::::::::::::::::::::::::::::	AMOUNT
DATE	1	MAINT	~	DEFINDANT	RETURNS
7/19/7/	stenographer's transcripts of Dec. 12, 1973 f	iled	$\neg +$	· · · · · · · · · · · · · · · · · · ·	קווקנור
7/19/7/1	Stenographers' transcripts of Dec. 13, 1973 f	led.		1	113/11/1
7/19/24/	Stenographer's transcript of Dec. 17, 18 and	Der.	10, 1	973	
77 11	filed.	1			45-47

1	UNITED STATES DISTRICT COURT
2	EASTERN DISTRICT OF NEW YORK
3	x
4	DOMINICK PAMPILLONIA, :
5	Plaintiff, :
6	- against - : EXCERPTS
7	CONCORD LINE, :
8	Third-Party Plaintiff, : 71 C 799
9	- against - :
10	COURT CARPENTRY & MARINE CONTRACTING : TERMINAL OPERATING CO.,
11	: Third-Party Defendant.
12	:
13	
14	United States Courthouse Brooklyn, new York
15	December 10, 1973
16	10:20 o'clock a.m.
17	
18	Before:
19	HONORABLE JACOB MISHLER, Chief U. S. D. J.
20	
21	
22	
23	
24	
25	ACTING OFFICIAL COURT REPORTER

Δ 6

1	2
2	APPEARANCES:
3	
4	FODERA, DORFMAN & FERRARI, ESQS. Attorneys for Plaintiff
5	EY: JACK H. DORPMAN, ESQ.
6	L. RICHARD FODERA, ESQ. Of counsel.
7	
8	MATCHT, GARDNER, POOR & MAVENS, ESQS. Attorneys for Concord Line
9	BY: WILLIAM P. KAIN, ESQ.
10	
11	
12	CICHIAMOWICZ & CALLA: ESQS. Attorneys for Court Carpentry
13	BY: GEORGE DELANEY, ESQ.
14	Of Counsel.
15	
16	Auber, Kirk & O'CONNELL, ESUS. Attorneys for I.T.O.
17	BY: JOSEPH COHEN, ESQ.
18	Of Counsel.
19	WATERFRONT COMMISSION, NEW YOUR HARBOR
20	BY: PAUL D. KELLY, ESQ.
21	Of Counsel.
22	
23	
24	

1	10 Pampillonia - direct
2	(Jury present.)
3	THE COURT: Call your first witness,
4	Mr. Dorfman.
5	MR. DORFMAN: Yes, your Honor.
6	THE CLERK: What is your full name?
7	THE WITNESS: Dominick Pampillonia.
8	THE CLERK: You're the plaintiff
9	THE WITNESS: What's the plaintiff, sir?
10	THE COURT: You may be seated.
11	THE CLERK: Be seated.
12	
13	DOMINICK PAMPILLONIA, called
14	as a witness, having been first duly sworn by the
15	Clerk of the Court, testified as follows:
16	DIRECT EXAMINATION
17	BY MR. DORFMAN:
18	Q Mr. Pampillonia, you're the plaintiff in this
19	action?
20	A What's the plaintiff?
21	Q You're the one who is suing?
22	A Yes, sir.
23	Q Does this action relate to an accident in which
24	you were involved on April 3, 1969?
25	A Yes.

Δ 8

1	11	Pampillonia - direct
2	Q	About what time of the day did this accident
3	occur?	
4	A	2:30 or 3:00 o'clock.
5	Q	In the afternoon?
6	A	Yes.
7	Q	Generally, where did it occur?
8	Λ	Excuse me?
9	Q	Where did it occur?
10	A	On the deck of a ship.
11	Q	Do you know the name of the vessel?
12	Α Α	To my knowledge I think it's JILL CORD, some-
13	thing like t	hat.
14	Q	Do you know where this vessel was berthed,
15	docked?	
16	A	Yes.
17	Q	Where was it docked?
18		Fier 2.
19	Ď	Brooklyn?
20	A	Yes.
21	Q	How old are you?
22	Α	29.
23	Q	What is your date of birth?
24	λ	August 1, 1944.
25	Q	Prior to this accident, what was your usual

Pampillonia - direct 27 2 Well, Mr. Laforte, the saw men was throwing 3 them to him on top of the hatch. The hatch was closed. He 4 was throwing them to him. He was giving to us, whereto 5 put it, how to nail it in. 6 THE COURT: A four by four means the size of 7 the lumber; right? Four inches by four inches? 8 THE WITNESS: Yes. 9 THE COURT: Then the length was cut to size? 10 THE WITNESS: To size, yes, your Honor. 11 How long had you worked at the inshore, No. 5 12 hatch? 13 Until we finish. A 14 Approximately? Until around ten after 2:00 I do not recall 15 16 te specific time. If you finish the work at the No. 5 inshore --17 18 Yes. -- were you then told what to do, where to go? 19 Yes. He had told us -- I don't think we are 20 finished that corner yet -- he told us that we are to chock 21 some heavy lifters on the No. 4 hatch. 22 Who told you you had to do the chocking? 23 Mr. Laforte, the foreman. 24

25

Where were you supposed to do the clfcking at

1	
	28 Pampillonia - direct
2	the No. 4, in the hold or on deck?
3	A In the hold of the ship.
4	Q What are heavy lifters?
5	A Heavy lifter could be a big case. It could be
6	a locomotive, a trailer. It could be a container. It
7	could be anything.
8	Q Did you make any preparation
9	A Yes.
0	Q in anticipation of doing any work in the
1	
	No. 4 hatch with regard to these heavy lifters?
2	A We were told to pick up these four by fours
3	and the nails and to put it to a a pallet. A pallet is to
4	pick up the cargo in order to put down on the hold of the
5	ship by the longshoreman.
6	A pallet is merely a platform; is that correct
7	A A platform about four feet by six feet. I
8	don't know if it's six or seven feet and it's got two floors
9	the op and chocks on the middle, bridles or wires with the
0	wires from the booms to pick them up and to bring it in the
1	held in the hatch.
2	Q Was any of the material put on to the pallet
3	near the No. 4 hatch?
4	A Yes.

Could you tell us where this pallet was located

1	29 Pampillonia - direct
2	at the No. 4 match first, was it inshore or off shore?
3	
4	A Inshore side of No. 4.
5	No. 4 or
6	A The middle of the No. 4 it was right by the
7	railing of the ship on the insure side, towards the pier, mor
8	towards to the pier.
9	2 Had you finished your work at the No. 5 inshore
10	and started to what had you done after you finished your
11	work?
12	A After we finished work
13	Q You, I'm talking about.
14	A Yes, we're picking up all the things there
15	was very few four by fours and some nails.
16	The foreman told me to pick up the saw, an
17	electric saw.
18	Q Where was this electric saw?
19	A On the No. 5 offshore side.
20	That would be the opposite side from which you
21	were then working; is that right?
22	A Yes.
23	Did you then go to get the saw from the No. 5
24	offshore?
25	A Yes.

1 Pampillonia - direct 30 2 Could you tell us what passageway or how did you 3 get to No. 5? 4 I was on --5 Inshore to offshore. 6 I was on the insnore side by the drums. 7 When I finished -- I don't remember we finished or did not 8 finish. I don't recall that. 9 I walked between the hatch, No. 4 and No. 5. 10 there was a passengerway maybe two feet, three feet. 1 11 do not recall. I walked in between in order to go to the 12 offshore side. 13 As soon as I pass over, I made a right turn. 14 I fell. Hew did you fall? 15 16 I fall on my back. What parts of your body struck what part of the 17 18 ship? Well, I hurt my shoulder, my right shoulder, 19 my right arm and my big finger and my marriage finger and 20 my back. 21 Did you feel any sensations; now did you feel 22 when you fell, anything? 23

Well, when I fell and I slipped. I tried to

help myself not to hit more. I hit my shoulder by the coaming

24

the uniform that this man was wearing, were you able to

tell who he was or what he was?

23

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Pampillonia - direct

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A Yes, he showed some card to the forman that he was the captain of the ship.

- Q Did he say anything to you? Without telling us what he said --
 - A Did he say anything?
 - Q Did he say anything to you?
 - A Yes.
 - Q Just did he say anything?
 - A Yes, he wanted to look --
 - THE COURT: Strike out what he said.
 - Q Did he do anything?
- A Yes. He looked me over. He looked at the grease on the back of my pants, my shirt and he picked my foot up and he saw there was grease underneath my shoe and then he patted me in the face and said, "Don't worry about it, you'll be all right."

MR. KAIN: I ask this testimony be stricken.

It's pure hearsay as to what he said.

THE COURT: Just strike out what he said.

- Did you remain on the ship for any period of time?
- A Yes. While I was there, this captain, he said -- he asked somebody to come in to clean it up.

MR. KAIN: If your Monor please, may I ask the

Pampillonia - direct

witness be directed not to testify as to what this person said to him.

THE COURT: That's the only objection, as to what he said?

MR. KAIN: And objection to the hearsay at the moment.

THE COURT: Strike out what he said. Don't give us any conversation that you had with this gentleman on the ship.

- Q Was any information taken at that time?
- A Yes.
- Did they take your name, address?
- A Yes.
- was it this man that you classified as a captain, the one that got this information, or somebody else?
 - h No, he was the chief officer of the ship.
 - Q When was that information taken from you?
 - A After they took me from where it happened to the gangway of the ship.
 - 9 Who did you meet at the gangway?
 - A There was this young fellow. He was wearing a white short, a tie and he had something like the Navy on top of his shirt (indicating).

Yes.

65 Pampillonia - cross THE CLERK: So marked as Defendant Exhibit A, 2 A-1 and A-2 in Evidence. Defendant Concord. 3 4 (So marked.) MR. KAIN: May I show them to the Jury? 5 THE COURT: Surely. 6 (Above-mentioned exhibits shown to Jury.) 7 THE COURT: Pass them along. 8 MR. KAIN: May I continue? 9 THE COURT: Surely. 10 BY MR. KAIN: 11 Did you, yourself, at any time that day oper-12 ate the saw? 13 No, sir. 14 Do you remember the name of the man in your 15 gang, your carpentry gang that did? 16 No, sir. 17 Did you also in your gang have a number of 18 lashers working with you? 19 No. sir. 20

Q There were no lashers working?

A None that I could remember, sir.

Q I think you made some mention of securing cylinders, I think you said, on deck?

A Yes.

24

21

22

23

1	66	Pampillonia - cross
2	Q	Were there any lashings put on this box or
3	fence?	
4	Λ	Not to my knowledge, sir.
5	Q	Did you see any lashers working on board that
6	day with Court	carpenters?
7	A	No, sir.
8	Q	Do you know what a lasher is?
9	A	I see them work sometimes, yes.
10	Q	What kind of work do they do?
11	A	They carry wires and a wrench.
12	Q	Do they carry anything else, any other packages
13	A	I wouldn't know that, sir.
14	Q	Have you worked as a lasher?
15	A	Maybe once. I do not remember if I did or
16	not.	
17	Q	I think you've told us that when you got up
18	on deck No. 5	hatch was closed; is that right?
19	A	Excuse me?
20	Q	I'll rephrase the question.
21		At the time you went to pick up the saw
22	A	Yes.
23	Q	No. 5 hatch, was it closed?
24	A	Yes.
25	Q	Was it covered up?

	n 10
1	67 Pampillonia - cross
2	A Yes.
3	Q You remember what it was covered with?
4	A With? A hatch cover and plus there was a
5	canvas.
6	Q What type of hatch cover was used on No. 5?
7	A I would not know, sir.
8	Q Were you present when it was being covered?
9	A No, sir.
10	Q When you got up out of No. 2 hatch or No. 3
11	hatch, where did you go to work then?
12	A Excuse me
13	Q When you came up out of shoring this heavy
14	cargo out of No. 2 or No. 3 hold you said it was
15	A Yes.
16	Q where did you go then?
17	To No. 4, offshore side.
18	Q What part of the No. 4 offshore side did you
19	go to?
20	A (No response.)
21	Q Did you go to the forward end of No. 4, the
22	aft end?
23	A The forward and the No. 4.
24	Q The forward?
25	A The forward.

1	68		Pampillonia - cross
2		Q	That's the front end?
3		A	Right.
4		Q	Is that correct?
5		A	Yes.
6		Q	Did you do any work at all at the aft end
7	of No.	4?	
8		A	No, sir.
9		Q	You're sure of that?
10		A	Yes, sir.
11		Q	If you know, were there any carpenters working
12	near th	he aft e	end of No. 4?
13		A	No.
14		Q	You don't know or there were no carpenters?
15		A	I don't remember, sir.
16		Q	Were there any other carpenters working in
17	your g	ang, oth	ner than Mr. Laforte, the foreman, yourself
18	and Mr	. Rina?	
19		A	When, sir?
20		Q .	Who was that, the sawman?
21		A	On No. 4 you're talking
22		Q	I say were there any other carpenters working
23	with y	ou that	day?
24		A	Yes.
25		Q	Other than the foreman and Mr. Rina, yourself

Pampillonia - cross

2	and the saw ma	an?
3	A	I do not recall if there was any guy, sir.
4	Q	When you came on board at 9:00 o'clock or
1	about 9:00 o'c	clock, what did you bring with you?
6	A	Just a hammer.
7	Q	Where did you get the manner?
8	A	Somebody lend it to me.
9	Q	Did you bring that down to the hull with you
10	when you went	to work or pick it up on the pier?
11	A	Pick it up on the ship.
12	Q	On the ship. From somebody in Court Carpentry
13	Α	I don't remember who gave it to me, no.
14	Q	Was there shoring gear on board when you
15	came on board?	
16	A	Excuse me?
17	Q	Was there shoring lumber on board when you
18	came on board,	, nails, lumber, things of that sort?
19	A	Yes, they were. Yes.
20	Q	While you were working, was any lumber brought
21	on board?	
22	A	Brought on board?
23	Q	Yes.
24	A	(No response.)
25	Q	For the carpenters.

22

1 70 Pampillonia - cross 2 A No. 3 All the materials you were going to use were 4 already on the ship; is that correct? 5 I think so, sir. 6 Where was this saw that you were going to 7 pick up or sent to pick up? 8 No. 5 offshore side of the ship. 9 You remember what part of No. 5 offshore? 10 Yes. I think it was in the -- in between 11 the hatch, in the middle of the hatch of No. 5. 12 Were there carpenters working there sawing 13 up lumber? 14 Yes, there was a man there. 15 MR. DORFMAN: May we have a time? 16 MR. KAIN: I'm referring when he went to pick 17 up the saw. 18 THE COURT: I'll allow it. 19 You may bring it out on redirect. 20 MR. KAIN: I'm sorry, sir? 21 THE COURT: You may continue. 22 BY MR. KAIN: 23 At the time you went to pick up the saw, 24 was there a carpenter working there sawing lumber, No. 5

25

offshore?

1	A 43
	71 Pampillonia - cross
2	A When I went to pick up?
3	Q Yes.
4	A No, there was nobody.
5	Q Was there anybody working in that area?
ű.	A When I went
7	Q Offshore No. 5 when you went to pick up the
8	saw?
9	A No, sir.
10	Q What was the condition of the deck when you
11	went to pick up the saw in that area?
12	A (No response.)
13	Q Was there sawdust in that area?
14	A There must have been.
15	Q Did you see any sawdust on the deck in the
16	area when you went to pick up the saw?
17	A Maybe I did. Maybe I not.
18	Q You don't remember?
19	A No, sir.
20	Q How about pieces of wood, were there pieces
21	of wood in the area?
22	A Yes.
23	Q Were there many pieces of wood or just one or
24	two pieces of wood?
25	A Well, there was a small draft, dunnage, with

aren't they?

A

Excuse me?

24

1	73	Pampillonia - cross
2	Q	Aren't they fitted with an oil reservoir, a
3	plunger, this	saw?
4	Α :	I would not know this.
5	Q	You would not know?
6	A	No, sir.
7	Q	What type of wood were you using to build
8	this box on th	e inside shore
9	A	Dunnage and four by fours.
0	Q	Dunnage and four by fours?
1	A	Yes.
2	Q	Is dunnage green lumber?
3	A	Green lumber?
4	Q	Yes.
15	Q	I don't know if it's green or old. I don't
16	know.	
17	Q	You don't know?
18		THE COURT: Is green lumber fresh lumber?
19	Is that	t lumber that hasn't dried out?
20		THE WITNESS: Yes, that's what he's trying
21	to say	
22	Q	You don't know whether dunnage is dry lumber
23	or green lumb	er?
24	A	I wouldn't know, sir.
25	Q	When you left the ship, you said you went
	down on the p	ier; is that right? Where did you go?

26 1 Pampillonia - cross 103 2 Do you know what the contents of the cylinders 3 were? 4 Yes. In order to be on deck, a red label 5 could be flammable, explosive. 6 In cribbing or boxing in these cylinders, you 7 up lumber, did you not? 8 I don't remember. 9 I don't necessarily mean you. The men in 10 your gang. 11 When you built this box or fence or container 12 for these cylinders, you had to cut up lumber to make it 13 out of, didn't you? 14 Yes, sir. 15 And while this lumber was being cut up, were there any lashers working on this type of cylinder? 16 17 A No, sir. 18 Did you stay there until this box or this container was completed? 19 Yes -- no, we went out for lunch. That's the 20 only time. 21 When you went out for lunch, all of the long-22 shoremen and all of the carpenters and all of the lashers 23

A I guess so.

left the ship, didn't they?

24

. 1	A 21
1	104 Pampillonia - cross
2	Q That's customary for everyone on the water-
3	front to go to lunch from 12:00 to 1:00?
4	A No, sir.
5	Q No?
6	A No.
7	Q When you came back, was there any evidence
8	when you came back after lunch, was there any evidence that
9	you were working there while you had gone to lunch?
10	A I wouldn't know, sir.
11	Q Is it your testimony that at the time this
12	box was completed there had been no lashing down on these
13	cylinders?
14	A Lashes.
15	Q I say no lashing work done on these cylinders
16	at the time you left?
17	A No, sir.
18	Q That is your testimony that there had been
19	no lashing?
20	A No, lashes. We went back to finish it off.
21	Q When you finished it off, you went where?
22	A To No. 5 inshore side.
23	Q What did you do at No. 5 inshore side?
24	A We were going to build a box for these red
25	labeled drums.

Δ 28

105 Pampillonia - cross 2 Did you build a box in fact for these red Q 3 labeled drums? 4 A Yes. 5 When did you finish that work? 0 6 A When we finished that work? 7 Yes. When did you finish? Q 8 A (No response.) 9 What time approximately? I know you didn't 10 have a watch but about when did you finish work on the box 11 on the inshere side of No. 5 hatch? 12 About ten after 2:00. A 13 About ten after 2:00. 14 The inshore side of No. 5 hatch, that's the side nearest to the pier, right alongside the pier, isn't it? 15 Would you repeat that word again, please? 16 I say, the inshore side of No. 5 hatch was 17 being the side near the pier. 18 Close to the pier, yes. A 19 0 Close to the pier. 20 Now, when you finished there, what did you do? 21 We were told to pick up whatever there was 22 there, the four by fours, to put it on top of a pallet. 23 Then we are to chock some heavy lifters to No. 4 hatch. 24

25

Who did you get these orders from, Mr. Laforte?

1	106 Pampillonia - cross
2	A Yes.
3	Q Did you take any gear up to No. 4 hatch in
4	accordance with Mr. Laforte's orders?
5	A Yes, sir.
6	Q Then what did you do after you took this gear
7	up to No. 4 hatch?
8	A He had told me to pick up a saw, an electric
9	saw.
10	Q Did he tell you where to pick it up from,
11	where to go to find it?
12	A No, he had told me, "Dominick, go get the
13	saw." I know where the sawman was cutting. He said, "Pick
14	up the saw." He didn't tell me exactly where the saw was.
15	Q That is what you were going to do when you say
16	this accident happened?
17	A Yes.
18	Q It was an electric saw, was it?
19	A Yes.
20	Where was it plugged in on the ship, if you
21	remember?
22	A I don't know, sir.
23	Q Did you unplug it before your accident?
24	A No, sir.
0.5	Q Now, at the time you were told to pick up thi

1 Pampillonia - cross 107 2 saw, were you on the inshore side of the ship or were you 3 offshore? 4 I was on the inshore side of No. 5. 5 No. 5? 6 Yes. 7 What did you do then? 8 I walked from No. 5 offshore toward where 9 there was the opening between No. 5 and No. 4. I walked 10 in between those two hatches. 11 Wasn't there a deckhouse between No. 4 and 12 No. 5 hatch? 13 What's a deckhouse, sir? 14 A housing with winches on top of it. A No, s.r. 15 16 Q Now housing. There was just a space between No. 4 and 17 No. 5 hatch; is that right? 18 19 Yes, to my knowledge, that I remember. When you walked to get this saw, you went 20 from the inshore side, the side next to the pier, across 21 the deck between No. 4 and No. 5 hatch; is that right? 22 Yes, sir. 23 And when you got over to the offshore side, 24 you turned right, did you? 25

Yes, go on, sir.

You turned right to go to No. 5?

Pampillonia - cross 1 108 2 Yes. Oid you look at the deck as you turned right? 3 Did you look at the deck along No. 5 hatch? 4 No, sir. 5 You didn't look down at the deck at all? 6 No, sir. 7 When you turned, you started to walk down 8 along the side, the offshore hatch coaming at No. 5; isn't 9 that right? 10 No, no, you get -- you get me confused. 11 I don't want to confuse you. 12 Forgive me, sir, I don't understand too good. A 13 If you understand too fast, I can't catch on to you. 14 Let me slow down. I want to understand what 15 happened to you 16 You walked across the deck from the inshore 17 side to the offshore side; that's the side next to the pier 18 to the side furthest away from the pier; is that right? 19 Yes. 20 Q You just told me, if I understand you correctly, 21

that you walked between the aft end or the back end of No. 4 hatch and the forward end of No. 5 hatch; is that correct?

> Yes, sir. A

22

23

24

Q If I understand you correctly, you told me that to the best of your recollection there was no deckhouse, no housing between four and five; is that correct?

5

4

1

2

3

(No response.)

6

THE COURT: Answer the question.

7

THE WITNESS: Yes.

8

Q When you got over on this offshore side, you started to walk aft along No. 5 hatch, along No. 5 hatch, did you?

10

9

A No, no.

11

12

Q Tell me what you did when you got on to the offshore side? Fernans that would be easier.

13

A I was talking between those two hatches, No. 5 and No. 4. I cross over. As soon as I made my right turn,

15

one step and a half -- I fell.

16

So you reached the offshore forward corner of No. 5 --

18

A Yes.

20

Q -- you turned right, took a step, a step and a half, and you fell; is that correct?

21

A Right, yes, sir.

22

Now, when you turned and started to take the step, the step and a half, did you look at the deck in that area?

24

the turn?

Pampillonia - cross

'	110	rampilionia - cross
2	A	No, sir.
3	Q	Didn't you know that they had been cutting
4	lumber in tha	t area?
5	A	Yes.
6	Q	But you didn't look at the deck?
7	A	But it was not there, sir, the lumber.
8	Q	Was there sawdust in the area?
9	A	Further down, yes.
0	Q	There wasn't any sawdust in the area where
1	you slipped?	
2	, A	Not that I remember, sir.
3	Q	What was in the area that you slipped
4	A	Grease.
5	Q	as you remember as being on the deck in th
16	area where yo	ou slipped?
17	A	What did I slip on it?
18	Q	No, I say what do you remember as being on
19	deck in that	area?
20	A	Oh, yes, there was maybe a little dunnage
21	and some four	by four by the offshore, at the end of the
22	offshore side	of No. 5.
23	Q	When you say at the end, do you mean at the
24	after end of	No. 5 hatch or the forward end where you mad

34 1 111 Pampillonia - cross 2 No, on the after end of No. 5. 3 2 What if anything was at the forward end of 4 No. 5, if you know? 5 Re; eat the question, again, sir. I say, what if anything was at the forward 6 end of No. 5 hatch on the offshore side when you made this 7 turn? 8 9 A Yes? 10 If you know. I didn't catch you, sir. 11 When you got over to the other side, you say 12 you turned might and took one -- one and a half or two 13 steps, and you fell; is that correct? 14 A Yes. 15 I'm asking you, if you know, what if anything 16 was on deck where you fell when you turned and took this 17 one and a half or two steps which you say you took; what 18 was on deck, if anything? 19 I don't remember, sir. 20 Do you know what you fell in? Q 21 Yes. 22 What did you fall in?

After they picked me off the floor, there was

23

24

25

grease on the floor.

1 Pampillonia - cross 112 2 When did you first see this grease on the 3 floor? When you say floor, incidentally, you're talking 4 about the deck? 5 Yes. When did you first see this grease? 6 After Mr. Laforte and Mr. Rina, they picked 7 8 me up from the floor. After they picked you up? 9 10 Yes. Did they point this grease out to you; did 11 12 they show it to you? Oh, no. Was right there on the floor, sir. 13 A So you saw it; is that right? 14 0 15 Yes. A How biy was this grease; where was this 16 17 grease? Sir, you're talking about how much before I 18 fell or after that I fell? 19 Q At the time you saw it, when you first saw it, 20 how much grease was it? 21 A A big slide with the foot. Then it was all 22 splashed up and then there was another piece some place else. 23

Q How much was it? Was there more than one

24

25

spot, sir?

1	113 Pampillonia - cross
2	Q Could you describe this grease for me?
3	A What do you mean by describing the grease?
4	A Could you tell me what it looked like?
5	A (No response.)
6	Q What color?
7	A It was dark, oily.
8	Q How big was the grease spot well, first of
9	all, did you see more than one spot of grease?
10	A After they picked me up.
11	Q After they picke you up?
12	A Yes, sir.
13	Q How many spots of grease did you wee?
14	A Where I fall, plus another spot some place
15	else, right next to me.
16	MR. KAIN: Your Honor, excuse me.
17	Q Mr. Pampillonia, do you remember testifying
18	at my office under oath on June 15, 1972?
19	A Yes.
20	Q Page 13, line 21, were you asked this question
21	"Question: Did you see this grease on deck
22	after your accident?"
23	Did you give this answer:
24	"Answer: After the accident?
25	"Question: Yes.

1 114 Pampillonia - cross 2 "Answer: When they picked me up from the floor. 3 "Question: Yes, after they picked you up, 4 did you see the grease? 5 "Answer: Oh, yes, sir. 6 Do you remember being asked those questions 7 and giving those answers? 8 Yes, sir. 9 Were you asked this question: 10 "Question: How much grease was there? "Answer: I don't know how much grease. I 11 do not know. It could have been maybe -- I don't 12 know." 13 Do you remember giving that answer? 14 Excuse me, sir. The man that was asking me 15 those questions, he started to tell me --16 THE COURT: Strike it out as not responsive. 17 Did you give that answer to that question? 18 THE WITNESS: Yes, your Honor. 19 Were you asked this question: 20 "Question: About how much? 21 "Answer: About this much (indicating). 22 "Question: Can you give me an estimate about 23

25

24

"Answer: I don't know. Maybe it was --

big this spot of grease was?

"Question: Was it six inches in diameter or

Pampillonia - cross

three	feet?

"Answer: No, no. It was small. It was all around, you know, three inches, four inches, five inches, something like that.

"Question: Somewhere between three to five inches?

"Answer: Something like this."

Do you remember being asked those questions and giving those answers?

- A Yes, sir.
- Q Do you know where this grease came from?
- A No, sir.
- When you first saw this grease after you were picked up, after your accident, was there a skid mark on the deck where you slipped?
 - A Yes.
 - Was there more than one skid mark?
 - A No, just one, the one from my foot.
- Q Did you examine this substance; di you feel it to make sure it was grease?
 - A Oh, yes.
 - Q You did pick it up in your hands?
- A After I got home, I took my pants off, my shirt was all greasy.

		A 39
1	116	Pampillonia - cross
2	Q Lis	ten to my question, Mr. Pampillonia/
3	Whe	n you were picked up after your accident,
4	this was pointed	out to you, that you say was grease on deck
5	Did you just look	at it or did you pick it up to examine
6	it, to see what i	t was?
7	A No,	I didn't pick it up, sir. I just looked.
8	Q You	looked?
9	A Yes	
0	Q It	appeared to you to be what, grease, oil;
1	what?	
2	A To	me and the other fellows, to my foreman
3	THE	COURT: Strike out 'to the other fellows."
4	Hov	did it appear to you?
5	A Yes	, grease.
6	Q You	say there was more than one spot of this
7	grease; is that	correct?
18	A Yes	•
19	Q Was	there more than two spots of this grease?
20	A The	t I wouldn't know.
21	MR.	KAIN: No further questions of this wit-
22	ness.	
23	THI	COURT: Mr. Delaney.

(Continued on next page.)

1	125	Pampillonia - cross - Delaney
2	A	Yes.
3	Q	Were you qualified to work as a winch man?
4	A	Yes, sir.
5	Q	How about a gangway man?
6	A	Yes, sir.
7	2	What is a gangway man, what does he do?
8	A	Well, if there's on the dock, for example,
9	the winch man	can't see the dock. So the gangway man
10	tells him whe	n to go up, when to stay down.
11	õ	He's also called a signalman?
12	A	Signalman.
13	Q	Gives the hand signals; right?
14	A	Hand signals; yes.
15	Q	Incidentally, we're talking about the ship
16	here, the JIL	L CORD, about the inshire and offshore side.
17		Which side was tied to the dock?
18	A	Well, if I was facing towards the front of the
19	ship	
20	0	Right
21	A	The pier is on the left. That's my left side.
22	Q	The prt side is tied up to the dock?
23	A	Yes.
24	Q	Now, when you worked on this cargo, No. 5
25	hatch, how fa	r back was that No. 5 hatch?

1	126	Pampillonia - cross - Delaney
2	A	Was on the after end of No. 5 by the railing
3		was on the after end of No. 5 by the failing
4	of the ship.	
5	Q	Is that all the way back on the main deck?
	A	Yes.
6	2	A few minutes ago Mr. Kain was asking you abou
7	this grease.	
8		Do you know the difference between grease
9	and oil?	
10	A	Definitely, sir.
11	Q	Grease is thicker; is that right?
12	A	Yes, sir.
13	Q	Like, say, vaseline?
14	A	Maybe.
15	Q	Yes. Oil runs or something; right?
16	A	Yes.
17	Q	You say you slipped on something that was
18	greasy; is th	at right?
19	А	Yes, sir.
20	Q	You say-you also say you don't remember where
21	it came from?	
22	А	Yes, sir.
23	Q	At any time before you slipped and fell, do
24	you recall be	ing in that general area of No. 5 hatch?
25	A	No, sir.

1	127	Pampillonia - cross - Delaney
2	Q	At any time while you were working around
3	No. 5 hatch,	did you see anybody from the ship around there?
4	A	I don't remember, sir.
5	Q	I think you described before that there was
6	an officer we	aring something on his shoulders?
7	A	Yes.
8	Q	Did someone wear a hat?
9	λ	He did not have no hat.
10	2	Did you see anybody with one of those things
11	on his should	er (indicating) around No. 5 hatch while you
12	were working	there?
13	Λ	No, sir.
14	Q	Did you see anybody else from the ship around?
15	А	No, sir.
16	2	Is the answer no, that you don't remember or
17	you didn't se	e?
18	A	Just the carpenters there, when we were there.
19	Nobody else.	
20	Q	No longshoremen either there; is that right?
21	λ	Right, sir.
22	. 0	I think you were asked before if you owned
23	an automobile	at this time.
24		What kind is it?
25	Δ	1971 Chevrolet Chevy.
	Q	What color is it?

1	146 Pampillonia - cross - Cohen
2	did you testify that when you turned and took that step
3	to go aft, to get to the saw, that you did not look to
4	see where you were putting your feet?
5	A Definite I walked. As soon as I turned, I
6	fell.
7	Q When you walked and took that step or step
8	and a half aft, were you watching where you put your feet?
9	A I don't have to watch where I put my feet.
10	Whether you had to watch or not, my question,
11	sir, were you watching where you put your feet in that step
12	or step and a half?
13	Q Had you watched where you were putting your
14	feet, would you have seen the grease that you saw after
15	the accident?
16	A Excuse me, repeat that word again?
17	Q If you had watched
18	A Yes.
19	where you were putting your feet for that
20	step or step and a half, would you have seen the grease
21	that you saw afterwards?
22	A Sure, I would have seen, sir.
23	Q If you had looked and seen that grease before
24	stepping into it
25	MR. DORFMAN: I object as being conjectural.

147 Pampillonia - cross - Cohen 2 THE COURT: Objection sustained. 3 You object to the last question? MR. DORFMAN: Yes. 5 THE COURT: Sustained as to that. Strike it 6 out. The Jury is to disregard it. 7 BY MR. COHEM: 8 Was there anything to prevent you from seeing 9 the grease before your accident, if you had looked? 10 MR. DORFMAN: Your Honor, I ask the question 11 to be modified to less than three words, if he looked? 12 THE COURT: May I have the question, 13 Mr. Silverman? 14 (Question read.) 15 THE COURT: Strike out the last phrase, "if 16 you looked." 17 Is there anything to prevent you from seeing 18 what was on the deck? 19 THE WITNESS: (No response.) THE COURT: Any obstacle in the way? 20 21 THE WITNESS: No. THE COURT: No. The area of the deck where a man could walk 23

proceeding aft, would be the area -- and I'm talking about

the number 5 hatch -- on the offshore side -- would be the

24

1	Pampillonia - cross - Cohen
2	area between the coaming and the ship's rail; is that cor-
3	rect?
4	A Yes.
5	The coaming is a metal fence about three feet
6	high that runs around the hatch opening; is that correct?
7	A Yes.
8	Q It might be similar to this rail in front of
9	the Jury box ecept it's made of metal; right?
10	A Yes.
11	Q As you of further offshore to the very side
12	of the ship, there is a rail at the end; is that correct?
13	A Yes.
14	Q Is that rail made of pipe or is it a solid
15	metal rail like the coaming?
16	A On that particular ship I wouldn't remember.
17	I think it was solid.
18	THE COURT: Is that the first time you were
19	on that ship?
20	THE WITNESS: Yes.
21	THE COURT: Have you ever been on there since
22	THE WITNESS: No.
23	Q Could you tell us approximately how much
24	distance there was between the coaming rail and the rail an
25	the side of the ship at the No. 5 hatch?

1 149 Pampillonia - cross - Cohen 2 (No response.) 3 Approximately. 4 Seven feet, eight feet. 5 A person who wanted to walk after at the 6 No. 5 hatch had that width of about seven or eight feet 7 that he could choose to walk along in; is that correct? 8 Yes. 9 The area of grease that you noticed after 10 the accident was, I believe you testified on your deposition, 11 about three to five inches in diameter. 12 Yes. 13 Was there anything on the deck between the coaming rail and the ship's rail in the area of the forward 14 end of the No. 5 hatch where you had your accident; was 15 there anything which would have prevented you from walking 16 around that spot of grease? 17 No, sir. 18 19 MR. COHEN: May I have a moment to look over my notes, your Honor. I may well be done. 20 (Pause.) 21 Was the saw man working with the saw, cutting 22 lumber for the other carpenters in the same place all day 23 long? 24

No, sir.

0

1	150 Pampillonia - cross - Cohen
2	Q He would move around from place to place?
3	A He was not from the ship.
4	Q Ipm sorry?
5	A He was not from the ship.
6	Q There's a word I missed.
7	There was
8	MR. COHEN: I haven't got the word.
9	THE COURT: Mr. Silverman, would you read
10	the answer.
11	(Answer read.)
12	The carpenters, the employees of Court Carpentry
13	one of their number worked as a saw man; is that right?
14	A Yes, sir.
15	Q He was the man who operated that chain saw
16	that we have pictures of and he would cut the wood to the
17	necessary lengths that the rest of you men needed; is that
18	correct?
19	A Yes.
20	Q Now, as that sawman on the ship when you go
21	aboard at about 9:00 in the morning?
22	A No, sir.
23	Q When did you come?
24	A After we finished the No. 4 offshore side.
25	Q Approximately what time of day was that?

1	151 Pampillonia - cross - Cohen
2	A Around 1:30, twenty after 1:00. I don't remem-
3	ber.
4	Q At that time that was the first time that
5	day there was a saw man working for you; is that right?
6	A Yes.
7	Q From that time on, did he cut the wood in
8	that one location?
9	A Excuse me, sir?
10	Q What I'm trying to find out, did the saw man
11	from the time he was working, did he work in the one location
12	on the offshore side of No. 5?
13	A Yes.
14	Q That's where he did all his cutting while he
15	was working?
16	A Yes.
17	Q Could you tell the Jury, please, approximately
18	how long the No. 5 hatch is from the forward end of the aft
19	end?
20	A About 33 feet long, 35 feet, and wide
21	Q I was going to get to that. About how wide
22	is it?
23	A About 20 feet.
24	Q Whereabouts was the saw man doing his work;
25	where was he cutting the wood?

1 Pampillonia - cross - Cohen 152 2 In the middle of the hatch of No. 5. A 3 So it would be about 17 feet aft, further back 4 of the forward end of the No. 5 hatch on the offshore side, 5 he was doing his cutting; right? 6 A Yes. Was there in that area a pile of wood that 7 he could use to cut whatever lengths of lumber he needed? 8 9 A Yes. 10 Where wasthat wood stowed? By No. 5, on the end of No. 5 of the offshore 11 12 side by the railing of the ship. Was that further after of where he was standing? 13 Yes, further and back of him, yes. 14 The space from the forward part of the No. 5 15 hatch up to the mdidle of that hatch, where he was working, 16 was there any wood stowed there? 17 I don't recall that. I don't remember, sir. 18 From time to time, as you needed wood of a 19 certain length, would you go over there to get one? 20 No. The foreman used to call the measurements 21 of thesize of that wood. The saw man, he had a rulter of 22 his own. He used to measure, cut it up and give ti to the 23 foreman. The foreman used to hand it to us, where to put 24

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it, how to put it.

1	153 Pampillonia - cross - Cohen
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3	
4	saw man to pick up the wood cut to the proper size and bring
5	it to the man no?
	A No, he didn't walk.
6	Q How did he get it?
7	A The saw man used to throw it over the hatch.
8	He used to grab it and pass it over to us.
9	2 Approximately what were the lengths of these
10	pieces of wood?
11	A Maybe eight, ten feet. Something like that.
12	11, 12 feet.
13	When you say the saw man would throw it over
14	the hatch, he would throw it over the width of the hatch
15	to the other side?
16	A Yes.
17	Q Are you saying the only time that wood was
18	needed from the saw man was when you were working on the
19	inshore side of the No. 5 hatch?
20	A Will you repeat that again, sir?
21	Q Yes withdrawn. I guess I said it as well
22	as I could.
23	Was the only time you needed wood from the
24	saw man, was that when you were working on the inshore side
25	of No. 5 hatch?
23	or no. 5 naton:

1	154	Pampillonia - cross - Cohen
2	λ	Yes.
3	Q	When you worked at the other hatches, you di
4	not need wood	from the saw man?
5	Λ	No.
6	Q	I see.
7		Now, the No. 5 hatch, I think you said was
.8	about 20 feet	wide?
9	A	Approximately. That's what the sizes mostly
10	are. I don't	know if it's less or more. I don't know.
11	2	Approximately is what we're talking about.
12	A	Yes, some ships have bigger ones. Some have
13	smaller ones.	
14	2	On that ship, your recollection is it was
15	approximately	20 feet wide?
16	А	Something like that.
17	- Q	You're saying the saw man would take these
18	four by fours,	eight to ten to 12 feet and throw it over
19	the hatch?	
20	Α	It was not much. If it's 20 feet, you have
21	a piece over l	10 feet long you don't have to throw you
22	grab it by the	e hands.
23	. δ	Now, did you see any carpenters working in
24	that area exce	ept the saw man?
25	A	No, sir.

1 155 Pampillonia - cross -Cohen 2 Did the saw man do his sawing on some wooden 3 horses he had set up? 4 I do not recall that, sir. I don't remember. 5 Did he have something set up on which he would 6 put the wood that he would cut with the saw? 7 I'll be a liar to answer, sir. 8 All right. 9 How far aft of the forward end of the 10 No. 5 hatch was the saw lying when you went to get it? 11 A It was the middle of the hatch. 12 The saw was lying on the deck? 13 On the floor. 14 Was it plugged into an outlet that was forward 15 of where it was or was it plugged into an outlet that was after of where it was? 16 17 I don't know. It had to be on the outlet in order to work but I don't know where it was, the wire. 18 19 Do you know the name of the saw man? No, sir. 20 A MR. COHEN: Thank you very much. 21 THE COURT: We'll take a short recess and then 22 we'll resume the questioning with Mr. Dorfman's 23 redirect. 24 (Recess taken.) 25

1	172 Pampillonia - redirect
2	A No, just up to here (indicating).
3	When you turn, what I am going to do, stop
4	to look what's over here? You walk, you turn, you never
5	look.
6	Q Is that the time you fell?
7	A Yes.
8	Q You can go back to your seat.
9	(Witness complies.)
10	Q You can't ride a horse today, can you?
11	A Definitely not.
12	MR. DORFMAN: I have no further questions.
13	THE COURT: Mr. Kain.
14	RECROSS-EXAMINATION
15	BY MR. KAIN:
16	Q Mr. Pampollonia, do you know how long this
17	grease you say was on deck was there before your accident?
18	A Excuse me, sir.
19	Q Do you know how long this grease you say
20	was on deck that caused your accident was there before your
21	accident happened?
22	A I don't know, sir.
23	Q Was there any body else on the offshore side
24	of No. 5 hatch or No. 4 hatch at the time of your accident?
25	A Nobody.

Rina - direct

some things.

I'm just explaining this that if I'm delayed,

I know that you're there and I want to start at 10:00

o'clock. Sometimes it's impossible. I usually
keep my word.

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JOSEPH RIMA, called as a witness, having been first duly sworn by the Clerk of the Court, testified as follows:

THE CLERK: Your full name for the record and spell it.

THE WITNESS: Joseph R-i-n-a-.

DIRECT EXAMINATION

BY MR. DORFMAN:

Q Ar. Rina, do you know Dominick Pampillonia?

A Yes.

@ He's the plaintiff in this action; is that correct?

A Yes.

The man who is in Court?

A Yes.

2 Did you know him in April of 1969?

A Yes.

2 Did you know him before that date?

1 Rina - direct 197 2 A Yes. 3 Are you a longshoreman? 4 Yes. 5 How long had you been a longshoreman before 6 April of 1969? 7 1966. A 8 In April of 1969, were you a member of a gang? 9 Yes. A 10 Were you working on April 3, 1969? 11 That day? 12 Yes, April 3rd. 13 Yes. April 3, do you remember M . Pampillonia having 14 had an accident sometime in April, 1969? 15 16 Yes. A Was that April 3rd, do you remember? 17 18 I don't remember the date. A In any event, you were working with him? 19 Q We were working together. 20 A

Who were you working for that day?

Court Carpentry, would that be correct?

You were a regular employee of Court Carpentry

For Carpentry.

Yes.

21

22

23

24

25

Q

A

Q

A

Q

Rina - direct

MR. KAIN: If your Honor please, I object to counsel leading the witness. The witness can be asked what happened. He said he saw something happen. I doesn't have to be asked.

THE COURT: Strike Mr. Kain's statement.

Certainly you don't think that question is misleading. It may be improper to inform as to what you know. It's not what this witness knows. It's what he saw and heard.

Q What did you see?

A I see the foreman. They told me and him to get some dunnage, some lumber, move one place and another place, to put down below in No. 4.

So, after, you know, we was moving the dunnage to put on the pallets to bring down below the hatch. Then, you know, Dominick has to go get a saw. So soon, you know, just I was looking, you know, he went around the hatch and I see him. He fall down from the hatch.

- Q From what area did he fall when he fell down, near what hatch?
 - A In between No. 4 -- No. 5, right.
 - Q Is that on the insore or offshore side?
 - A Offshore.
 - Q Did you do -- render any assistance?

Δ 57

207 Rina - direct

A Yes, I went to see what happened, you know.

I see him down. I helped him, you know. The foreman, he was there. www helped, you know. Then he wanted the captain, the officer. he come up to see him and he see has back, you know, all scratched and swollen and red.

- Q Did you see Mr. Pampillonia's back?
- A Yes.
- pid he take off his clothes?
- Yes.

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- What did you see when we took --
- A I seen, you know, the shoulder was all Lad, scratched (indicating).

THE COURT: You're pointing to the left shoulder.

THE WITHLSS: I don't know if it's the right or -- because I don't remember. I saw it was red because even the officer of the ship, they seen him.

- www. did you help Mr. Pampillonia off the ship?
- A Yes.
- Where did you take him?
- A To a doctor.
 - what doctor did you take him to?
 - A br. Tag.
 - Q That's Dr. Tagliagambe?

1		A
1		Δ 58
	208	Rina - direct
2	A	Right.
3	2	Who was he, do you know?
4	· A	What?
5	2	Who is Dr. Tagliagambe, do you know?
6	A	Doctor for longshoremen.
7	2	After that, did you go back to work?
8	A	No, because it was late.
9	Q	Did you return to work the following day?
10	λ	I beg your pardon?
11	2	Did you go back to work the following day?
12	A	The next day?
13	2	Yes.
14	Α	Yes.
15	Q	Did you have an opportunity to see what caused
16	Mr. Pampillo	nia to fall?
17	Δ	What.
18	Q	Did you see what caused Mr. Pampillonia to
19	fall?	
20		THE COURT: Sustained as to form.
21		THE WITHESS: What?
22		THE COURT: Don't answer that.
23		Did you go back and look on the deck at any

THE WITNESS: Say that again?

24

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time?

1 209 Rina - direct 2 THE COURT: After Mr. Pampillonia fell --3 THE WITNESS: Yes. 4 THE COURT: -- did you go back to look at the 5 deck? THE WITNESS: No. 6 7 THE COURT: You didn't see --THE WITNESS: I see grease on there. 8 9 THE COURT: Did you see grease on the deck? THE WITNESS: Yes. 10 THE COURT: Proceed. 11 BY MR. DORFMAN: 12 When did you see the grease on the deck? 13 When Dominick, you know, he fall. There was, 14 you know, he fall; there was, you know, there was on his 15 shoes, on the back, there was, you know, he had some grease. 16 When was that when you saw this, what time? Q 17 I don't know. 18 I don't mean the hour. When -- when you went 19 over to help him. 20 A Yes. 21 MR. KAIN: I note for the record the same ob-22 jection, your Honor. I think this could have been 23

THE COURT: Objection overruled.

asked differently.

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1	210 Rina - cross
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3	MR. DORFMAN: I have no further questions.
	CROSS-EXAMINATION
4	BY MR. KAIN:
5	Q Mr. Rina, April ? 1969, were you a member
6	of a regular longshore gang?
7	A What?
8	Q Were you a regular member of a longshore gang
9	on April 3. 1969?
10	A A gang?
11	Q A gang, a longshore gang?
12	A I have a gang.
13	Q Did you have a regular gang in 1963?
14	A 1963?
15	Q I'm sorry, 1969.
16	A Yes, sir.
17	Q Whose gang were you a regular member of in
18	1969?
19	A 1969? Richard Devison.
20	That's a longshore gang as opposed to a car-
21	penter gang?
	A No, longshoreman.
22	
23	
24	union?
25	A Carpenter?

1	A 61	
	211 Rina-cross	
2	Q Carpenter's union?	
3	A. No.	
4	Q Were you a member of the carpenter's union	
5	on April 3, 1969?	
6	A (No response.)	
7	" Q Did you come from the union hall with	
8	Mr. Fampillonia?	
9	A Yes.	
10	Q Did you know Mr. Pampillonia before April 3,	
11	1969?	
12	A Yes.	
13	Q How long before had you known Mr. Pampilloni	a?
14	A A couple of years.	
15	Q What part of Italy do you come from?	
16	A Palermo.	
17	Q Is that the same place that Mr. Pampillonia	
18	comes from, de you know?	
19	A It's not far away, about 15 minutes.	
20	Q What time did you get on baord this ship?	
21	A About 9:00.	
22	Q About 9:00 in the morning?	
23	A Yes.	
24	Q Did you bring any gear with you when you can	ne
25	on board?	

212

Rina - cross

A N

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Were you given any gear to work with after you came on board?

5

A Yes.

6

Q What were you given?

7

A The hammer.

No.

8

Q A hammer. What else?

9

A Then you got, you know, the saw.

10

Q What kind of saw?

11

A Electric.

12

Q Did you operate this saw?

13

A No.

14

Q If you know, did Mr. Pampillonia operate the

15

saw?

16

A I don't think so.

17

When you came on baord, you went down into

18

No. 2 or No. 3 hold; is that right?

19

A Yes.

20

Q Why did you go down, for what purpose?

21

A Because the longshoremen, they can's do work because we have to carck the cargo first. They have some

22

ammunition down in the hatch.

24

Q Do you remember what type of cargo you were chocking in No. 2 or 3 hatch that day?

25

A Heavy cases.

le fols.

	CROSS-EXAMINATION
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BY MR. KAIN (Cont'd):

Q Heavy cases?

A Yes sir.

Q Did you take any lumber down into number two or number three hatch at that time?

A I think they had lumber over there. I don't remember.

Q When you got down there, did you have saw up this lumber in order to chock these cases?

A Down the hatch?

Q Yes.

A I think they was helping us, they would cut the lumber and give to us.

Q Somebody cutting the lumber and passing it down to you; is that what you mean?

A I think. I used to just put the nails.

Q Was Mr. Laport down there to tell you how he wanted these chocked?

A Yes.

Q And you were down there, I think, untillabout 11 O'clock, is that right?

A Yes.

Q Then where did you go?

		Rina-cross 214
2	A	I went on deck.
3	Q	Where did you go on deck?
4	A	They told us what
5	Q	Where did they tell you to go on deck?
6	A	We had to go to number four.
7	Q	Offshore or inshore?
8	A	Offshore.
9	Q	Do you remember what you did at number four when
10	you got then	re?
11	A	We checked something.
12	Q	Did you build a box of fence around them?
13	A	Yes.
14	Q	Did you cover them?
15	A	I don't remember.
16	Q	Do you remember the color of these cylinders?
17	A	Black, white. I don't know.
18	Q	I don't want you to guess.
19	A	How could I remember the color?
20	Q	When you working on these cylinders, did you have
21	any lashers	working with you?
22	A	No.
23	Q	No lashers working with you?
24	A	No.
25	Q	Did any lashers work with you in the hold?

1		Rina-Cross	215
2	A	I don't think so.	
	Q	How long did it take you to finish	this job at
Market St. St. St. St. St. St. St. St. St. St	number four h	atch?	
Contracts or standard	A	More than an hour.	
	Q	Sometime after 12:00 when you finis	thed?
And the last of th	A	Yes. We went to eat.	
	Q	When did you go to eat?	
CANADA SERVICE SERVICES	A	12 O'clock, 11:30 we left.	
Section of Persons and	Q	So you worked about a half hour bef	ore you took
A CHARLES COMMON CONTRACTOR	your lunch br	eak; is that right?	
Contraction of order of contraction of the contract	A	Yes.	
Control of the Contro	Q	Did you come back to this box of cy	linders to
Management of the Parket	number four h	atch when you returned from lunch?	
CONTRACTOR OF CONTRACTOR	A	I think we were finished.	
	Q	You finished it in a half hour?	
	A	Repeat that again.	
	Q	I want to know if you can tell me i	f you
	remember, whe	ther you finished the work on the cy	linders you
	were working	at number four hatch.	
		Did you finish that by 11:30 when y	ou left for
-	lunch?		
-	A	I think so because we went back to	number five.
-	Q	After lunch you came back and went	to work at

number five?

1		Rina-cross 216
2	A	Yes.
3	Q	The cylinders you loaded at number four, that
4	was offshore,	the cylinders you boxed in?
5	A	Yes.
6	Q	What part of number four hatch was that forward
7	end, front en	d or after end of the hatch, back end?
8	A	Front of the ship.
9	Q	Front of number four hatch?
10	A	Yes, in the middle of the hatch.
11	Q	In the middle of the hatch?
12	A	Yes.
13	Q	Did they extend back aft of the number four
14	hatch?	
15	A	I don't remember.
16	Q	How long did you work at the inshore side of
17	number five h	atch when you came back?
18	A	I think about two hours.
19	Q	So that would be sometime around 3 O'clock you
20	started works	ing there?
21	A	Yes.
22	Q	During this time you were working on the inshore
23	side of number	er five hatch, was there anybody working on the
0.4	offshore side	e of number five hatch?

Yes. I think one of the carpenters.

1		Rina-cross		217
2	Q	What work was he doi	ng?	
3	A	Sawing lumber, I thi	nk.	
4	Q	What kind of a saw w	as he using?	
5	Λ	Electric.		
6	Q	Do you know the name	of the man who	was operatin
7	this electric	saw?		
8	A	I don't know.		
9	Q	While you were worki	ng in this two h	our period
10	from 1:00 to	3:00 on the inshore s	ide was this man	sawing for
11	you on the in	shore side?		
12		While you were worki	ng on the inshor	e side was
13	this man on t	he offshore side cutt	ing the wood you	were using
14	on the inshor	e side?		
15	A	Yes.		
16	Q	Did there come a tim	e when you finis	shed this
17	job on the in	shore side of number	five?	
18	A	Yes, about 3 O'clock		
19	Q	Then what did you do		
20	A	We were supposed to	go to number for	ir, inshore.
21	We got to go	to number four inshor	e down the hatch	1.
22	Q	Down into the hatch?	•	
23	A	Yes.		
24	Q	Did you go down into		
25	A.	No, because they to		
	lumber and p	tfrom one place and	put them onto	the pallets

1		Rina-cross 218
2	and bring the	em down below.
3	Q	Did you get this lumber and put it on the pallet?
4	A	Yes.
5	Ω	Where did you get the lumber from?
6	A	From number five.
7	Q	What part of number five?
8	A	Inshore.
9	Q	And did you carry it forward to number four?
10	A	Yes, from number five I was carrying from number
11	four putting	them on the pallets.
12	Q	More than one pallet that you put it on?
13	A	No. We were loading the pallets. Soon we were
14	supposed to 1	oad the pallets they got an accident too
15	Pompillonia.	
16	Q	At the time of Mr. Pompillonia's accident you
17	weren't on th	e offshore side of the ship, were you?
18	Λ	Where?
19	Q	At the time of the accident you weren't offshore?
20	Α	No.
21	Q	Where were you?
22	A	Before the accident he was with me, inshore.
23	Q	Where?
24	A	The part of the docks.
24	Q	At the number five hatch?

Near number four hatch?

Right.

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I went all around to the hatch and helped him.

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Did anybody else come with you when you went around to help him up?

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Yes.

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How did you get from the inshore side to the offshore side? What path did you follow?

2	How did you get from one side of the ship to the
3	other?
4	A We went with number four?
5	Q Across number four?
6	A We went across number four all around like this
7	and then we went back to a ladder down below on the deck.
8	Q Was number four hatch working with the longshore
9	men, working number four hatch at the time of the accident?
10	A I think they were finished.
11	Q You think they were finished.
12	How about number five, were they working that
13	hatch at the time of the accident?
14	A No, we would do the work.
15	Q If you remember, was the hatch covered on number
16	five at the time of the accident?
17	A I guess. I think.
18	Q I don't want you to guess. If you know, tell
19	me. If you don't, remember to tel! me.
20	A I think there was a hatch cover or pantoons. I
21	don't remember. I seen there was cargo.
22	Q It was closed with a canvas cover over it?
23	A Yes, with the lent.
24	Q When you got to the scene of this accident was
-	there anybody else there other than Mr. Pompillonia?

1		Kina-cross 222
2	A	Working?
3	Q	When you got to where Mr. Pompillonia had falle
4	was anybody e	lse there?
5	A	Yes, the foreman.
6	Q	He was already there?
7	A	Yes. He was on the floor. He was on top of
8	the hatch, I	think.
9	Q	He was on top of number five hatch?
10	A	Number five, I think, four or five. I don't
11	remember exac	tly. I saw the boss, the foreman was there and
	they see.	
12	Q	He was there when you got there?
13	A	Yes.
14	Q	You don't know where the foreman was at the time
15	of the accide	nt?
16		Is that right?
17		You don't know whether he was at four or five?
18	A	I don't remember whether he was. I don't
19	remember what	hatch he was. Four or five because he was on
20	top of the has	tch.
21	ď	When you got to where this accident happened,
22	what did you	
23	A	I see grease.
24	Q	Where did you see the grease?

A

Q

five hatch?

22

23 24

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I am talking about the spot of grease that you

Is your answer it was at the front end of number

Rina-cross 2 said it was two feet outboard of the offshore hatch combing. 3 I want to know how far was it from the front end of the number 4 five hatch combing. 5 You know what the hatch combing is? Yes. 6 Well, was it near the front end or back end of 7 this railing of number five hatch? That is what I am asking. 8 9 A No, the front. Was it at the very corner, front corner of the 10 hatch or how far back was it? 11 From the corner back. 12 How far back? 13 I don't know, 20 feet to a hatch. 14 I don't think you understand me. I am talking 15 about the spot of grease. 16 I seen a bunch. 17 Where was it, at the forward offshore corner of 18 the hatch combing or back some distance down the hatch 19 combing? 20 This was the hatch, right? A 21 You are indicating the forward hatch combing. Q 22 This is the combing, now the grease was over 23 here. 24

25

Q

Front end?

		Rina-cross 225	
	A	Yes, just maybe, when you turn around to go	
around	the has	ch he must have slipped because they can't see.	Managed or other Designation of the last o
	Q	Was there lots of grease, sir?	-
		How much grease was there?	-
	A	I don't know. I see grease.	
	Q	How much grease did you see?	
	A	Enough that people can get hurt.	
	Q	Can you tell me how much it was, one spot, two	
spots,	ten spe	ots?	
	A	I don't know how much it was. I see the grease	200
on dec	k and t	hen you know, Dominick has it on his body.	
	Q	If you can tell me how much grease there was on	
deck,	a littl	e bit of grease, a lot of grease?	
	A	Not a little, not a lot but enough for people	
to get	hurt.		
	Q	Would characterize how much it was, three foot	
area,	covered	by grease, one foot area, two feet, six feet,	
six ir	ches, t	en feet? How much?	
	A	I don't know.	
	Q	You don't know?	
	A	I don't know.	
	Q	You just remember there was some grease there?	
	A	There was grease.	
	Q	Was there anybody there at the time you got to	
this a	accident	other than Mr. Pompillonia and Mr. Laport, your	

1		Rina-cross 226
2	foreman?	
3	A	It was another carpenter who was having to saw.
4	Q	The saw man?
5	A	Yes, because I don't know how to use the saw so
6	they call som	mebody from another ship to help.
7	Q	Was the saw man offshore at number four hatch
8	at the time of	of the accident?
9	A	Offshore.
10	Q	Is that where he was at the time of the accident?
11	Offshore numb	er five hatch at the time of the accident?
12	A	Offshore before.
13	Q	Was he there at the time the accident happened?
14	A	No, after.
15	Q	You mentioned something to Mr. Dorfman about a
16	ship's office	er.
17		How long after you got to the scene of this
18	accident did	the ship's officer get there?
19	A	Not even five minutes.
20	Q	Did you say anything to the ship's officer?
21	A	No.
22	Q	Do you know if Mr. Pompillonia did?
23	A	If I know?
24	Q	Do you know whether Mr. Pompillonia said anythin

to this ship's officer?

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A No. The officer of the ship saw the grease-
Q Did you point this grease out to him?

A I saw it. He saw, even the officer saw the grease.

Q After this officer got there did there come a time when Mr. Pompillonia left the offshore side of number five hatch?

A At that time?

Q Did there come a time, sometime when Mr. Pompillonia left the offshore side after this accident happened?

A Just that he went from inshore and he went offshore. That is when it happened.

Q After the accident did he leave the ship?

A I take with me.

Q Did anybody else help you?

A Me and Joe, we helped him to the ladder.

Q When you say Joe, you mean the foreman?

A Right.

Q You helped him off the ship?

A Yes. We got out of the ship. The first mate stopped and he took some information, name or something.

Q How did you help Mr. Pompillonia off the ship?

A I carried him.

Yes.

A

1		Rina-cross	229
2	Q	Did you stay with him after he got	to Dr.
3	Tagliabambi's	office?	
4	А	Yes.	
5	Q	Did you take him home after Dr. Tag	gliagambi
6	was through wi	th him?	
7	A	Yes.	
8	Q	You didn't go back to work that day	λ.5
9	А	No, because it was late.	
0	· Q	Did you work on that ship the next	day?
1	A	No.	
2	Q	You don't know or you didn't?	
3	Α	No, I did not work because I am no	t a carpenter
4	I have to shar	be to get the job.	
15	Q	Have you seen Mr. Pompillonia socia	ally since
16	this accident?		
17		Have you been out with him other th	han working?
18	A	The time he got hurt.	
19	Q	Since his accident, since he got he	urt, have
20	you seen him?		
21	A	I don't see him a long time.	
22	Ω	When did you first find out Mr. Por	mpillonia had
23	a lawsuit beca	suse of this accident?	
24	A	Λ law	

THE COURT: You know Mr. Pompillonia is suing?

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You know that?

THE WITNESS: Yes.

THE COURT: Mr. Kain wants to know when did you know for the first time that he was suing.

THE WITNESS: Today.

Q Who told you today he was suing?

A I spoke five minutes to the lawyer.

Q Did the lawyer call you?

A Yes.

Q And today is the first time that you talked to anybody about what happened in this case?

A My first time.

Q Your first time?

A Yes.

Q You haven't discussed it with anybody since

April 3, 1969; is that right?

A No.

Q Has anyone ever asked you to give a written statement about this case?

A Nobody.

You haver't discussed it with anybody?

A I never seen nobody.

Q The first time you spoke to anybody at all about this case was today?

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'	
2	A Today. I come here. That is my first time.
3	MR. KAIN: That is all.
4	MR. DELANEY: I have no questions.
5	CROSS-EXAMINATION
6	BY MR. COHEN:
7	Q When you were at the number four hatch at the
8	time that Mr. Pompillonia was sent over to number five, you
9	were on the inshore side of number four; is that correct?
10	A Yes.
11	Q About how many feet forward of the after end
12	of number four were you on the inshore side?
13	A From number four?
14	Q How many feet forward from the back end of
15	number four were you?
16	A A couple of feet.
17	Q Two feet, three feet?
18	A Something like that.
19	O From where you were standing were you able to
20	observe Mr. Pompillonia as he was walking?
21	A What?
22	Q From where you were standing were you able to
23	observe Mr. Pompillonia as he was walking?
24	A Yes.
	O Were you able to see him as he walked?

man.

MR. KAIN: There's no name in that log book.

MR. COHEN: We'll take out the word longshore-

MR. KAIN: We're straining the difference

THE COURT: Are we ready now?

being longshoreman, carpenter.

MR. DORFMAN: Just one more thing.

Since your Honor is going to indicate to the jury all monies received in compensation will be reimbursed by the plaintiff, I would like to have a figure for that.

THE COURT: Mr. Delany ought to know what the compensation lien is, how it's broken down.

MR. DORFMAN: \$12,166.00 as of September 25th,

At the appropriate time, we will furnish the exact amount to date and since he's still receiving \$50.00 a week --

THE COURT: I'll certainly charge the compensation lien must be paid back to the carrier out of any proceeds of the recovery and I think if I say that much, I ought to tell them how much.

MR. DORFMAN: We'll give you the exact figure.

THE COURT: Subject to that, do you rest?

MR. DORFMAN: Yes.

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THE COURT: Would you like to do that before the jury?

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Seat the jury.

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THE CLERK: Page from log and translation of said page marked Plaintiff's Exhibit 10 in evidence.

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(So marked.)

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xxx

(Jury enters courtroom)

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THE COURT: While you were waiting out there,

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the plaintiff asked me to take judicial notice of

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one of the regulations of the safety and health

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regulations for longshoremen, promulgated by the

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United States Department of Labor, Bureau of Standards.

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I'll charge you on the effect of it, but for

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now it says: "Slippery conditions shall be eliminated

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as they occur."

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In your absence, there was submitted a bill of the Samaritan Mospital of Brooklyn for six days

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from the period March 12th, 1973 to March 18th,

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1973 in the amount of \$719.00.

21 22

The defendant's stipulated that Dr. Tagliagambe's services for the treatment of the claimed back injury

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was \$860 some odd dollars.

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The defendants made the stipulation but they

want it understood they do not concede that the treatemnt was causally related, was reasonably necessary because of what --

MR. KAIN: If your Honor please, that's only with respect to the Samaritan Hospital records, that reservation.

THE COURT: You do concede causal relationhip on the other?

MR. KAIN: On the other, yes, your Honor.

THE COURT: Very well, that the medical bills incurred in the Samaritan Hospital of Brooklyn were not causally related.

In other words, they didn't flow as a result of the accident or the claimed injury.

Then there was also introduced into evidence with the consent of the parties, Exhibit No. 10 which is a page of the log, a log being like a diary kept by the Captain, but it's in Danish, so that was submitted. With it, a translation which the parties agree is a fair and accurate translation.

I told you there was also marked in evidence a notice from the Army or an order discharging the plaintiff from the Army. It has names of other individuals. You know Army orders usually contain a number of individuals. Pay no attention to the

THE COURT: I'll excuse the jury f or a few moments.

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(Jury leaves courtroom.)

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THE COURT: Any motions, gentlemen?

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MR. KAIN: If your Honor please, before I make my motions, in view of your Honor's reading to

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the jury 1504.91, may I ask your Honor to take

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judicial notice of, and to also read to the jury

when they make 1504 2(a) and 1504 2(a) hoggys

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when they return 1504.2(a) and 1504.3(c) because

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I believe the portions as read might convey the

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idea to the jury that the regulations are binding

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upon the ship owners and so set forth in the

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sections, your Honor, that they are binding on the

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employer.

THE COURT: Anything else?

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MR. KAIN: May I may my motions now?

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THE COURT: Surely.

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MR. KAIN: At this time, if your Honor

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please, the defendant moves to dismiss the

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complaint for failure to make out a prima facie

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case. The defendant further moves to dismiss

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the indictment of this cause of action on the

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grounds there has been no proof in this case that

the defendant either caused the condition complained

of or that the defendant had any notice of the condition.

The defendant further moves to dismiss

the unseaworthiness count of the complaint on the

grounds there was not enough proof of the amount

of grease, the nature, or the amount of time that

it was existing there and that there was no proof

or no competent proof that this grease, if there

in the ship, not reasonably fit for its intended use.

Further we move to strike all of Dr.

Tagliagambe's testimony as to the causation of plaintiff's alleged back condition and to have the Court instruct the jury to disregard this testimony since Dr. Tagliagambe stated that the back condition he found could possibly be caused by:

- A, a tumor,
- 2, inflammation, and
- 3, a protruded disc, some of which conditions concededly could not have been caused by plaintiff's alleged accident and that Dr. Tagliagambe further testified that he did not make the necessary tests to determine which, if any, of these three conditions were responsible for plaintiff's back conditions.

THE COURT: Let's answer the motion as it relates to the negligence theory.

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Mr. Dorfman, answer please.

MR. DORFMAN: If you look at the log, the log reflects that hatch No. 5 was worked on a few hours before. I think the inference can be drawn that if there was work being done at that time that that whatever condition was created was created at that time.

I think that's sufficient to show there w's notice, certainly constructive notice because of the period of time in which the condition remained on the deck to have justified a cause of action for negligence.

THE COURT: That there was no other activity that could have created that condition.

MR. DORFMAN: If we look at the log, it seems to indicate that.

MR. KAIN: That was 1100 hours. There's no testimony in at this time, your Honor, that the grease happened while the longshoremen were loading or discharging the hatch as the case may be.

There's no testimony as to when it happened.

I submit and I think your Honor pointed out to

Mr. Dorfman, a necessary concomitant with negligence is proof of notice, either actual or constructive.

THE COURT: Yes, I agree.

o'clock.

Where do you say -- point out to me where in the log it would indicate to you or where in the log is there enough that they jury may draw an inference that nothing happened on that ship for two hours; in that two-hour period that the ship should have known?

MR. DORFMAN: Item No. 2, where it has the hour. 1100, No. 5, finished loading.

Now, the conclusion therefore, is that work was done at No. 5; that it was finished at 1100 hours and if the condition was created, I submit the inference can reasonably be drawn the condition was created at that time and since no work was done after that period of time, the inference then it was there for a period of four hours.

MR. KAIN: If your Honor please, that notation—
THE COURT: I don't think that that is so.

The mere fact that they stopped working was that the condition was there at the time they stopped working.

"noidentally, they were working right up --

MR. KAIN: It refers only to the longshoremen.

The plaintiff testified on the stand they were cutting wood and tossing it across.

THE COURT: That's what I was about to say.

MR. KAIN: This is the injury. This is 11:00

THE COURT: No one testified that this condition was there one moment before. There's no proof as to how long it was there. The claim for personal injury as based on negligence is dismissed.

There's no proof that the shipowner, that he created the condition or had notice of any dangerous condition, actual or constructive.

I might say, parenthetically, or I may be repeating myself, -- I don't know how it makes a difference to the claimant. If you can't prove breach of the warranty of seaworthiness, you can't possibly prove negligence. The condition wasn't there, it wasn't there.

The mere fact you have to prove the additional element doesn't give you an additional right.

That's an additional burden.

Anyone who has a motion in addition to that made by Mr. Kain, any further argument on the issue of seaworthiness? Causal relation?

I assume you join in the motion?

MR. DELANEY: Yes.

MR. COHEN: Yes, your Honor.

THE COURT: Motion denied.

There's a fact question on all the issues presented on the seaworthiness theory -- that is,

23 unseaworthiness theory if you want it correct.

MR. KAIN: If your Honor please, with the Court's permission, at this time, your Honor knows I would normally proceed with my case.

Mr. Delaney asked me -- I believe it was either this morning or yesterday afternoon, if he could bring in his two doctors as of this time since they are unavailable to him at any other time.

THE COURT: Any objection, Mr. Dorfman?

MR. DORFMAN: No, your Honor.

THE COURT: Seat the jury.

I'll explain that to the jury.

(Jury enters courtroom.)

THE COURT: I previously alerted you to the regulation at the request of the plaintiff which is in the safety and health regulations for long-shoring. It says: "Slippery conditions shall be eliminated as soon as they occur."

The regulations refer to the relationship between the employer and employee. And 1504.2(a) says: "The responsibility for compliance with the regulations of this part is placed upon the 'employers' as defined in Section 1504.3(c) of this part."

It says: "The term 'employer' means an

employer any of whose employees are employed, in whole or in part, in longshoring operations or related employments as defined herein within the Federal maritime jurisdiction on the navigable waters of the United States."

From that definition, I charge you that the shipowner, the defendant is not an employer of this plaintiff.

In the normal procedure, the defendant Concord line, the shipowner, would proceed. The defendant C&C Lumber, which has been called Court Carpentry, has brought in a doctor or doctors to testify and to accommodate the doctors, with the consent of the plaintiff, the doctors will be called out of turn.

Nielsen - direct

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Pampill.	
00/00	

(Jury enters courtroom.)

THE COURT: Mr. Kain, your next witness.

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SVEN NIELSEN

called

as a witness herein, having been first duly sworn
by the Clerk of the Court, was examined and testified
as follows:

THE CLERK: State your full name and spell it.

THE WITNESS: Sven Nielsen. S-.-e-n

N-1-e-1-s-e-n.

DIRECT EXAMINATION

BY MR. KAIN:

Mr. Nielsen, what is your occupation?

A At the moment I'm Chief Officer.

Q What vessel are you Chief Officer?

A Chief Officer.

THE COURT: The Reporter finds it difficult to understand you.

THE WITNESS: L-a-u-r-i-t-s-e-n and Concord

Line.

THE COURT: If you use any Danish words, wait for the Reporter to get them.

THE WITNESS: I will.

Q How long have you been going to sea,

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Nielsen - direct

New YOrk on or about April 3, 1969, Captain?

A The 30th of March, the ship anchored at 2:10. March, 1969.

Q When did the ship sail from New York, Captain, thereafter?

A The ship left the 4th of April, 1969, at 2300 hours.

THE COURT: What are you offering?

MR. KAIN: I am offering, your Honor, from

March 30 to April 4, 1969, inclusive.

THE COURT: Any objection, Mr. Doriman

MR. DORFMAN: No objection.

THE COURT: Let those pages be marked.

THE CLERK: So marked as Defendant Concords

Exhibit N in evidence.

(So marked.)

THE COURT: Did you have an opportunity to see the translation?

MR. DORFMAN: No, I haven't had an opportunity.

I didn't see the original log, if that's what you are talking about.

MR. KAIN: I provide with Xerox photocopies.

MR. DORFMAN: That's correct copies, I assume.

THE COURT: Any objection to the translation?

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Nielsen - direct

MR. DORFMAN: No.

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THE COURT: Let the translation be marked.

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Where are the translations?

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We better mark the translations.

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THE CLERK: With a number?

7

THE COURT: Letter, rather.

8

ind doon! Booter, racing

THE CLERK: Translation of pages of the log

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from March 30, 1969 to April 4th, 1969, marked

from March 30, 1909 to April 4th, 1904, market

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Defendant Concord's Exhibit 0 in evidence.

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(So marked.)

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MR. KAIN: Might I note for the record, your

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Honor, that those pages, because of limitations of

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my being able to photostat them, the upper page,

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they're clipped together in twos, pairs, in other

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words.

side.

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The upper page, if I understand it correctly is a translation of the left-hand side of the page

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and the log book, the lower one being the right-hand

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BY MR. KAIN:

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Q Captain, I show you this paper and ask you if you care to tell me, what it is, please (handing to

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witness)?

A Yes, it's a cargo plan showing stowages of the

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Nielsen - direct

Monday, March 31, was there any work done by the longshoremen on that day?

- A No longshoremen that day.
- Q Was there any particular reason for that that you know of?
 - A Holiday. It was a holiday.
 - Q It was a holiday.

Was it a ship's holiday or was it -- I shouldn't have to ask it, but was it an American holiday as opposed to a Danish holiday?

- A Yes -- I didn't get that.
- Q Was it a Danish holiday or American holiday or just a day no work was done?

A Danish holiday. Also, American holiday. Otherwise they would work. They wouldn't care whether it's a Danish or not. They would follow Americans.

- Q How about April 1st, was there any work done aboard the ship by the longshoremen that day?
- A Yes, three gangs, starting 8:00 o'clock and finishing at 5:00 o'clock and one hour meal break from 12:00 to 1:00, regular hours.
- Q Does your log book indicate in which hatches these longshoremen -- these three gangs of longshoremen worked?
 - A During the day they were working. During the

day they were working in all five hatches.

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Q All five hatches.

4 5

Does the log book indicate how long they worked in each hatch, how long in No. 1, 2?

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A No.

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It indicates at 2:00 o'clock the cargo to be loaded in hatch No. 1 was loaded.

Yes, it indicates that at 8:00 o'clock,

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Q How about on April 2nd, Captain, was there

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any work done by the longshoremen aboard the ship that day?

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three gangs, and that day they worked until 1800 -- that's

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6:00 o'clock and they had normal one-hour meal break from

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12:00 to 1:00 and two times during the day, was stopped for

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rain from 8:30 until 9:00 o'clock and from 2:45 to 3:00

16

o'clock in the afternoon.

in hatch No. 2, 3, 4 and 5.

17

Q How about on April 3rd, what work was done aboard the ship by the longshoremen that day?

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A On that day, there were three gangs and working

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Q Does the log book indicate how long the long-shoremen worked in No. 5 hatch that day?

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A Yes. It indicates 11:00 o'clock, they

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finished loading in hatch No. 5. It indicates that the gangs finished at 6:00 o'clock and they had one hour meal

1 16 Nielsen - direct 2 break. 3 Now, when the longshoremen finished work at 4 No. 5 hatch at 11:00 o'clock, what did they do, if anything, 5 to No. 5 hatch? 6 I did not understand. 7 When the longshoremen finished with the hatch 8 at 11:00 o'clock, did they close up the hatch? 9 Yes. 10 The last thing they would do when loading cargo on 11 deck, so earlier, that day, they closed the hatch because 12 no more was to go down in the hatch. 13 That is sometime before 11:00 o'clock? 0 14 A Yes. 15 0 They had closed No. 5 hatch? 16 A Yes. 17 In order to close No. 5 hatch, what do they 18 have to do? 19 The hatch covers are covered with heavy steel 20 weighing one and a half ton. 21 They put them on with cargo gear. They put 22 a canvas cover over to make it --

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O Could you describe a pontoon, what does it look like?

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A Like one of these cases. It's a steel,

Nielsen - direct

20 foot long, five or six foot wide.

- Q About how thick?
- A (Indicating) Less than a foot.
- Q Is it a large piece of steel that serves to cover the hatch opening?
 - A Yes.
- Q You remember how many pontoons it took to cover the hatch opening of No. 5?
 - A Six, seven pieces.
- Q Could you tell me, Captain, while the long-shoremen were working in No. 5 hatch, from March 30, I think you said the first day and until April 3rd, were these pontoons out of the hatch opening?

Were they removed from the hatch so that they, the longshoremen could work them?

- A They were all removed and placed on deck and during the nights, put a tent over to protect it from rain.
 - . Q You put a night tent on?
 - A Night tent on.
- Q When the longshoremen started work on the 30th, was it necessary for them to completely open up the No. 5 hatch? In other words, did they take the pontoons or hatch boards out of all of them?
 - A Yes, they had to go down. They knew they were

Nielsen - direct 1 going to load cargo, better take it all off. It's safer. 2 Was cargo loaded into the No. 5 lower hold 3 in New York? 4 Yes. It's indicated by the plan. 5 Would that -- or can you tell if that work 6 would have been commenced sometime on March 30? It's not indicated here clearly, but by 8 the amount of tons, only 18 tons for an eight-hour day, 9 they would definitely have finished this job they started 10 loading. 11 How about the other deck levels, these pon-12 toons were on the main deck level; is that correct? 13 Yes. 14 What did you have on your upper 'tween deck 15 level and lower 'tween deck level; what closed the hatches 16 on those levels? 17 Beams and hatch boards. 18 Those are removed how, Captain, with machinery 19 or by hand? 20 The hatch boards are wooden pieces. They are 21 moved by the longshoremen by hand, and the beams, the steel 22 beams that are supporting them are moved by derricks with 23 the cargo gear.

Q You said this ship was moored portside to the pier; is that correct?

24

Nielsen - direct

Q Do they also have hatch bosses?

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A Also a hatch boss.

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and specifically on April 3, 1969, what inspections did you yourself make as chief officer of this ship, what inspections of that ship did you make?

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A If all started at 8:00 o'clock, I'd go around

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trip, around the ship and look for the gangway, any unsafe

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conditions on deck or whatever operations take place.

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O Do you check your cargo gear, too, to see

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it's proper and ready to be used?

13

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A Yes. check that the convertors are running so that there will be no delay at the winches, that they

15

are operating properly.

16

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Q If there are any delays, who pays for them?

If there are delays because of the breakdown of the ship's

18

winches or ship's cargo gear?

19

A The stevedore, he will make up a winch stop or any such delays. The company would have to pay for it.

20

Q That's paid for by the ship?

22

A Paid for by the ship, yes. If they are

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having any winch problems or such things, the company would come and ask for a report from . either the chief

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officer or the chief engineer what the problems have been,

to explain.

inspections of the shin?

this check just before 8:00 o'clock, did you make other

Captain, on April 3, 1969, after you made

Yes. Later, during the day, around 10:00

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o'clock I was in the aft hatch, No. 5.

Q For what purpose were you at hatch No. 5 at approximatel or sometime after 10:00 o'clock?

That time they were about to finish loading into the hold and we are loading some deck cargo, so when they cover up the hatch, it's as I explained yesterday, was these pontoons, one and a half ton --

2 Are you referring to hatch No. 5?

A Hatch No. 5. The top hatch, its heavy steel covers to protect it from the weather and these one and a half ten pieces, pontoons, are 20 foot long.

Sometimes if they don't handle them carefully, they will make dents in some parts of the ship or damage.

I have to see if there aren't any damages to the ship.

- O Did you on April 3, 1969 make this check --
- A Yes.
- -- of the pontoons which are replaced --
- A Yes.
- o -- on the weather deck No. 5?

Nielsen - direct

A Yes.

Q Did you make the check of the deck cargo that you referred to that was loaded at No. 5?

A After they have covered the hatches and we were going to load some poisonous gas, that had to be down in the hold if one bottle was leaking — and I had the morning before, at 8:00 o'clock, discussed where to load them with the stevedore and I checked that they actually stowed them where I wanted them and also, they were in a tight stow so it would be possible to secure them so they wouldn't shift.

Q Were these, this poisonous gas -- incidentally, do you know what it was used for, this poisonous gas, what purpose?

A As far as I know, it's bromide cyanide, something like this.

Do you know what it was used for?

A For fumigation purposes.

Q Incidentally, what run was this ship on, where did she go?

A She would go between the ports of the east-coast of North American and also St. Lawrence River in the summertime and then through the Panama Canal to New Zealand.

1	Nielsen - direct
2	Q This cargo that you were loading on April 3,
3	1969 was consigned for New Zealand?
4	A Consigned for New Zealand, yes.
5	Q When the deck cargo, these cylinders of gas,
6	did you make an inspection of where they were loaded?
7	λ Yes.
8	Ω What time did you make this inspection?
9	A Could you please repeat that?
0	Q Approximately what time did you make the
1	inspection of the cylinders of gas?
2	A Just around 11:00 o'clock. They have finishe
3	loading this deck cargo.
4	Q Could you tell me where on deck you you
5	may refer to the cargo stowage plan, if you will.
6	Where on deck was this cargo stowed?
7	A These bottles were loaded off the masthouse,
8	which is between hatch No. 4 and hatch No. 5. The purpose
9	is for stowing them there was it's a good place. In
0	New Zealand, they don't have to work cargo over and
1	they don't have to have the pontoons near them and also,
2	there's a regulation in New Zealand that says they're not
3	allowed to work over labeled cargo, poisonous labeled.

When you say off the masthouse, what do you

They're not allowed to work over red label.

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Nielsen - direct

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A Yes, but it was loaded to go with the other red labeled stuff that's previously been loaded on the portside; to keep the cargo separated.

There's a regulation that requires that this labeled cargo can't be stowed together.

Now, Captain, after those bottles had been loaded and you inspected this stowage on deck, was there anything more to be done with these bottles after they had been loaded on deck?

I'm referring now to the starboard side of the masthouse between No. 4 and No. 5 hatches.

What else had to be done, if anything, to these bottles after they were put on deck?

A They had to be secured, to make a box around them.

Who made the box around them, Captain, do you 'now?

A The carpenters, we had some carpenters to do securing of the cargo.

Q Were these ship's personnel, these carpenters or shoreside carpenters?

A Shoreside carpenters. They wouldn't allow crew to do any of this kind of job on board the ship.

Q In connection with the stowage of these

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Nielsen - direct

A The people from shore.

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That's not done by any ship's crew?

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A No.

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It can only be done by ship's crew when we

6

are at sea.

Q

7

Now, Captain, while this box was being built,

8

did you have occasion to be up on deck inspecting the work

of the building of this?

10

Yes, after the meal break at -- between

11

12:00 and 1:00, after just after 1:00. I was inspecting

12

the job they were doing.

13

When you made this inspection, did you look

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to see if there were any other conditions that needed

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correcting?

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ship, I look for hazzards, any shackles of the gear is about

During all my inspections when I got inthe

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to open, or all kinds of dangerous hazzards.

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Did you inspect the condition of the deck at 8:00 o'clock and at 11:00 and shortly after 1:00 o'clock

20 21

when you were in the vicinity of No. 5 hatch?

22

of any kind?

23

Did your inspection on those occasions dis-

24

close any foreign matter on the deck, slippery conditions

Nielsen - direct

	A	No.	If	I	had	observed	eny,	it	would	have
been	correcte	ð.								

- Q Captain, was there a time on April 3, 1969 when you were informed of an injury, a carpenter or long-shoreman?
 - A Yes.
- Q At the time -- first of all, approximately what time was it, Captain, that you -- or this accident was reported?
 - A Around 3:00 p'clock.
 - Q In the afternoon?
 - A In the afternoon, yes.

I have -- I had made an inspection, just after 1:00 o'clock, I was at No. 2 hatch where they were loading heavy lifts.

Q What were you doing at No. 2 hatch while they we: 1000ing these heavy objects?

A Just checked they didn't damage the ship or cargo and one of the tractors had to be placed in the square of the hatch and if you don't place it in the right place, if you're a little bit careless, you could break some of the hatch material and damge the ship's machinery.

- Q This was where, No. 2 'tween deck?
- A No. 2 lower 'tween deck.

1 Nielsen - direct 23 2 What time did you go down into No. 2 lower 3 'tween deck to witness this loading operation of these 4 heavy lifts and this bulldozer or tractor? 5 A After I made the round trip, around the ship, just after 1:00 o'clock when they started. 6 Q It was sometime between 1:30 and 2:00 o'clock 7 8 approximately? 9 A Yes. I'm trying to find out when you went down 10 there? 11 A Yes. 12 How lond did you stay down in Ho. 2 lower Q 13 'tween deck? 14 I went up at 3:00 o'clock to get a cup of 15 coffee. 16 For what purpose did you go up? 17 To get a cup of coffee. That's usually our 18 coffee time. There was some -- I mean at that time they 19 had made some of the lifts down there and they had to be

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secured.

goes along.

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23

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Do you remember where you were on the ship when this accident was reported to you?

They have to secure some of the cargo as it

24	A 108 Nielsen - direct
A	I was walking on the deck from No. 2 hatch
into the mess	room, off hatch No. 2.
0	Do you remember who reported the occurrence
of this accid	lent to you?
A	Yes, the third officer. That's the man that
usually looks	after the two hatches on the deck aft.
0	When the third officer reported this accident
to you, what	did you do?
А	I went down to see what had happened, to
inspect.	
Q	When you say you went down to see what happened
where did you	u go?
A	I went in the offshore side.
?	Of what hatch?
A	I went from No. 2 hatch, 3 hatch, and passing
down to hatc	h No. 5. That's the usual way I go because
it's dangero	us to walk in inshore side.
Q	When you're indicating you walked aft on
the offshore	side, isthat correct, from No. 2 hatch to
но. 5	
. A	Yes.
2	did the third officer accompany you?

Did he tell you or did he show you where the

Yes, sir.

1	25 Nielsen - direct
2	accident had occurred?
3	A Yes, sir.
4	Q Where did he show you or what place was it that
5	he showed you as the place where the accident occurred?
6	A Starboard side of No. 5 hatch, he showed me
7	a spot of grease.
8	Q Where was this spot of grease located with
9	respect I'm asking you now with respect to the starboard
10	or the offshore hatch coaming, this rail on the offshore
11	side, where was it located with respect to that rail?
12	A Six or eight feet from the forward end of the
13	hatch and a foot or two from the hatch combing.
14	Q Could you describe this spot of grease that he
15	showed you?
16	A (Indicating).
17	Q What did it look like?
18	A Ten contimeter, three inches in diameter,
19	like
20	Q What color was it?
21	A Dark brownish, like a burnt pancake.
22	Q Were there any skid marks in the area of this?
23	A I didn't see any.
24	Q Did there appear to be any other substance
25	in with this grease or oil or whatever it was?

!	A 110
1	Nielsen - direct
2	A It was a brown substance with some solid
3	matter as far as I recall. It's brown.
4	Q Did you pick it up to examine it or touch it
5	at all?
6	A No.
7	Q Did the third officer tell you he had been
8	present when it occurred?
9	A He told me he had not been present when it
10	occurred. One of the other carpenters had shown the spot
11	to him.
12	Q It was shown to him by a carpenter?
13	A Right.
14	Q Now, when you were shown this spot of grease
15	what did you do?
16	A I told the third officer to get the men to
17	clean it away. I looked if there were any other spots of
18	grease around.
19	Q What did you do then?
20	A I went over to see
21	Q I'll withdraw the quration.
22	You went to see if there were any other
23	spots of grease around?

Did you look at the offshore side to see if

Yes.

24

	A 111	
1	Nielsen - direct	
2	there were any spots of grease?	
3	A Yes.	
4	Q Did you see any other spots of grease?	
5	A No.	
6	Q After you told the third officer to ha	ve 15
	cleaned up, what did you do?	
8	A I went to the gangway to see what had	happened
9	to the man.	
10	When you got to the gangway, was the m	an still
11	there?	
12	A Yes, he was standing at the top end of	the
13	gangway.	
14	Q Was there anybody else with him?	
15	A Yes, there were two other men.	
16	Q Did you say anything to this man, the	injured
17	man?	
18	A Yes, I asked him what had happened?	
19	Q Did he tell you?	
20	A Yes.	
21	Q What did he tell you?	
22	A He complained	

he say generally to you, what happened?

23

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25

I know you don't know exactly, but what did

He complained that he had slipped on deck and

1	28 Mielsen - direct
2	he had pain in his shoulder, his right hand and his back.
3	Q Did he tell you anything else that you
4	remember?
5	A He indicated that it was painful, it was
6	hurting. To me
7	MR. DORFMAN: Objection.
8	Q Don't tell me that "to me." I just want to
9	know what he said to you, what you said to him.
10	A That's what I recall.
11	Q Did he leave the ship at any time while you
12	were at the gangway?
13	A Yes.
14	Q Now did he leave the ship?
15	A Two fellows were walking with him down the
16	gangway and into the shed.
17	Q After he left the ship, did you go back to No.
18	hatch?
19	A Yes.
20	Q Captain, I show you these five pictures
21	marked A to F inclusive (handing to the witness.)
22	I ask you to tell me if those pictures are
23	a fair representation of that hatch as it existed on
24	April 3, 1969 at approximately 3:00 o'clock when you went
25	back to the area?

1	29	Nielsen - direct
2		A Yes.
3		MR. KAIN: I offer them in evidence.
4		THE COURT: Show them to Mr. Dorfman.
5		First mark them for identification.
6		The letters given by Mr. Kain have no relationship
7		to the markings here.
8		MR.KAIN: I coded them for my own use.
9		THE COURT: Remark them, please.
10		MR. KAIN: May I ask your Honor to leave the
11		codes on? I have to otherwise I'll be lost.
12		THE COURT: Surely.
13		THE CLERK: Six photographs marked Defendant
14	-	Concord's Exhibit T through T-5 inclusive.
15		THE COURT: There were five photographs?
16		THE CLERK: There were six.
17		THE COURT: Six photographs, you said?
18	-	MR. KAIN: Five, I have, your Honor.
19		A through F inclusive.
20		MR. COHEN: That's six.
21		THE COURT: A through F is six.
22		MR. KAIN: I'm sorry.

THE COURT: Mr. Kain said five.

23

24

25

THE CLERK: Six photographs marked Defendant

Concord's T through T-5 inclusive for identification.

Nielsen - direct

(So marked.)

THE COURT: Show them to Mr. Dorfman, please.

(Said photographs handed to Mr. Dorfman.

THE COURT: And to the other lawyers.

Suppose we take a short break at this point.

ave a look at them in the meantime.

(Recess taken.)

(continued next page.)

DIRECT EXAMINATION

Pad 2 12/13

ss/nd

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BY MR. KAIN: (Cont.)

(Jury enters courtroom.)

THE COURT: Mr. Kain, you can proceed.

MR. KAIN: I've offered them in evidence.

MR. DORFMAN: Plaintiff has no objection.

MR. DELAMEY: No objection

MR. COHEN: No objection.

THE CLERK: So marked in evidence, six photographs, T through T-5, Defendant Concord's

Exhibit in evidence.

(So marked.)

MR. KAIN: May I approach the witness stand?

THE COURT: Surely.

BY MR. KAIN:

Q Captain, I show you this photograph which is Defendant's Exhibit To in evidence.

I ask you, if you will, to tell me what that picture shows?

- It shows part of hatch No. 5 of the JILL CORD.
- Can you tell from where it's taken, Captain, which direction the camera is pointing?
- from the portside, inshore side and viewing over the top of the hatch, with the covering of

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Nielsen - direct

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the hatch. You see a part of the masthouse. You see a little bit of the box with the gas cylinders.

MR. KAIN: May I pass these to the jury, your Honor, after I iden tify them.

THE COURT: Surely.

Q I show you Defendant's T-3 in evidence and ask you if you can, tell me what that picture shows.

A That's a part of hatch No. 5, the after end.

It's taken from starboard side, looking to the port side.

You see a bit of the poop house.

Q Is there a fixture shown in that photograph , Captain?

A There's a place, a fixture where we usually have the portable gangway, just here. There's cable and connection here.

Q Is there an electrical connection shown?

A Yes, just see it up in the upper corner.

The cover for it is hanging.

THE COURT: Would you put an arrow on that picture to show where the electrical connection is.

Just put in red, electrical connection, and an arrow.

(Witness complies.)

THE COURT: Is it off the picture or on?

THE WITNESS: Just in the corner of the picture.

1	Nielsen - direct
2	THE COURT: Put some pressure on the crayon,
3	write it heavy to show the arrow.
4	(Witness complies.)
5	THE COURT: Suppose you put CON to show
6	it's an electrical connection.
7	(Witness complies.)
8	THE COURT: Put an arrow where you say th
9	gangway is.
10	(Witness complies.)
11	THE COURT: Just put G for gangway.
12	(Witness complies.)
13	BY MR. KAIN:
14	Q Is that a gangway fitting?
15	A Yes.
16	THE COURT: You say the gangway
17	THE WITNESS: Will fit in here.
18	THE COURT: Closes on the fitting?
19	THE WITNESS: So you can secure it in bad
20	weather.
21	THE COURT: Very well.
22	THE WITNESS: There's a mooring wire

coming down from the top of the house.

(Said photograph passed to the jurors.)

THE COURT: What is a mooring wire, the

23

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Nielsen - direct

line that holds the ship in position to make it fast, tied to the other end of something at the shore?

THE WITNESS: Yes, there's some bits on

BY MR. KAIN:

Where would that mooring wire be put out?

shore where you make it fast so it won't shift.

- A From the aft end.
- Q From the aft?

A They would take it up, a similar one on the port side used for a spring wire.

Q Captain, will you look at this photograph which is Defendant Exhibit T-5 in evidence (handing to witness).

Tell me what it shows.

A That shows the starboard side, forward end of hatch No. 5 and it shows the masthouse. It shows blue gas cylinders being loaded.

O Are those gas cylinders being shown in that photograph the cylinders that you are talking about that were loaded at No. 5 hatch and were being cribbed or boxed?

- A Yes, that's it.
- Q At the time of this accident?
- A Yes.
 - Q Continue.

1	35 Vielsen- direct
2	A I see a wire reel, drum.
3	Q Is that it?
4	(Said photograph passed to the jury.)
5	Q Captain, I show you Defendant's Exhib it T in
6	evidence and ask you if you care to tell me what that shows?
7	A That's still hatch No. 5, forward end of the
8	hatch. That's the masthouse between hatch No. 4 and hatch
9	No. 5.
10	THE COURT: Do any of these pictures show
11	the spot where you say you saw a spot of grease?
12	THE WITNESS: Yes, it's indicated here
13	(indicating).
14	THE COURT: Would you please, sir, with this
15	brown pencil which may show better, show the point
16	at which you say you saw
17	THE WITNESS: If I encircle it
18	THE COURT: You can circle it, all right.
19	(Witness complies.)
20	THE COURT: Did you intend indicating the
21	size of the spot or just the place within which or
22	the place of that circle?
23	THE WITNESS: That's the place. If you look
24	carefully, you can see a little spot darker spot.
25	That's where it had been cleaned, just in here

(indicating).

Nielsen - direct

	THE (COURT:	Mayb	e you	ought	to	try	it	with
red.	Brown	didn't	show	up.					

MR. KAIN: There's another photograph that shows it better.

THE COURT: Suppose you circle it in red.

(Witness complies.)

THE COURT: All right.

(Said photograph passed to the jury.)

BY MR. KAIN:

Q Captain, I show you Defendant's Exhibit T-1 in evidence and if you care to tell me what that photograph is?

A Starboard side of hatch No. 5, looking forward from forward and aft, you see a little bit of the poop house. There's another part of the support for the wire reel you saw in the picture.

THE COURT: Is the poop house raised above the decks for navigational purpose?

THE WITNESS: Accommodation for the crew.

THE COURT: Sleeping quarters?

THE WITNESS: Yes, it's sleeping quarters,

Captain and some of the crew.

THE COURT: Continue.

THE WITNESS: Also -- now we don't have the other picture. It would indicate the spot.

1	Nielsen - direct
2	THE COURT: The spot doesn't show on that
3	picture?
4	THE WITNESS: No, not clearly, not unless
5	You compare them.
6	THE COURT: Very well.
7	(Said photograph passed to the jury.)
8	BY MR. KAIN:
9	Q Captain, will you look at Defendant's Exhibit
0	T-2 in evidence and tell me, if you can, what that picture
1	is (handing to witness.)
2	A That's a closeup picture of the spot.
3	THE COURT: Put a circle around where you
4	say the spot is.
5	(Witness complies.)
6	MR. KAIN: The witness had said it was cleaned
7	up.
8	THE WITNESS: It was cleaned up.
9	THE COURT: That's where you say the grease
0	was when you first saw it?
1	THE WITNESS: Yes.
2	THE COURT: Was that about the size of it,
3	too?
	THE WITNESS: It's a larger size now because it

was cleaned with kerosene so it was spread in a somewhat

xx

Nielsen - direct

11		가게 하는 사람들은 사람들이 되었다. 이 사람들의 이 사람들이 살아 하는 사람들이 되었다. 그렇게 하는 사람들이 살아 하는 것이 없는 사람들이 없는 것이 없는 것이었다면 없는 것이 없는 것이었다면 없는 없는 것이었다면 없는 없는 것이었다면 없었다면 없는 것이었다면 없어요. 없는 것이었다면 없는 것이었다면 없는 없는 것이었다면 없는 것이었다면 없는 것이었다면 없었다면 없었다면 없었다면 없는 것이었다면 없는 것이었다면 없는 것이었다면 없었다면 없었다면 없었다면 없었다면 없었다면 없었다면 없었다면 없
2	greats	r area.
3		THE COURT: All right, show it to the jury.
4		(Said photograph passed to the jury.)
5	BY MR. KAIN:	
6	Q	Captain, did you come to New York at my
7	request to te	stify in this case?
8	A	Yes, I did.
9	Q	How long ago did you get here?
10	Λ	Deg pardon?
11	Q	How long ago did you get here?
12	Α	It's 13 days now, the 1st of December.
13	° Q	What time did this ship sail from New York
14	in April of 1	969, Captain?
15	A	It sailed the next day, was the fourth, at
16	2103, that's	9:03 p.m
17		MR. MAIN: I have no further questions.
18	CROSS-EXAMINA	MIION
19	BY MR. DELANE	Y:
20	Q	You have the log book, Mr. Nielsen?
21	λ	I have the log.
22	0	Does the log book indicate on April 3rd whether
23	there was any	rain?
24	A	No rain indicated on the 3rd.
25	Q	In the log book, right above the entry

Nielsen - cross/Delaney 39 1 Yes? 2 -- "somebody falling, "is there an entry there, 3 "holiday"? 4 Yes. 5 Was that a Danish holiday? 6 It was a Danish holiday. 7 On your holidays, on a Danish holiday does the 8 crew work? 9 Not the whole crew. We would have two men, 10 handy men that would do change of wires, cleanup, or anything 11 to do. 12 They would do no maintenance work on the 13 ship, just sit in the mess room and being ordered out to do 14 the things that can't be upset. 15 So, on April 3, from the deck department 16 of the ship, there were only the mates on watch --17 The three mates and two standbys. A 18 The men? 19 Yes. 20 Your log book indicates no work was done 21 from 12:00 to 1:00. 22 12;00 to 1:00, no work was done. 23 Do you remember of your own recollection 24 whether any work was done by any member of the crew between 25

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Nielsen - cross/Delaney

12:00 and 1:00?

A There was not. I mean the union wouldn't allow them to do it. Why should they do it on a holiday? They can't. They will do work that can't be upset. They won't do painting, chipping, or rust or any sort of these things.

Q What kind of cargo gear did you have at No. 5 hatch?

A We had just a normal set of cargo gear, five ton gear.

Q Two booms?

A Two booms.

Q Were these two booms fastened to the masthouse between No. 4 and No. 5?

A They were on the mast a little bit, a little bit kind of recess when they were fastened in a crew's neck.

Q The winch controls are located where?

A On the top of the masthouse.

Q Do these booms have runners on tham?

A They have regular runners, five -ton runners.

Q The runners are made out of metal wire?

A Yes, steel.

Q Were those booms, had they been lowered down into a rest position when the work finished at No. 5 hatch?

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41 Melsen - cross/Delaney 2 Not the same day that the accident happened. 3 At the time of the accident, were they still Q 4 in an upright position? 5 They were in an upright position. 6 Was one of them positioned approximately 7 over the place where this grease was located? 8 As far as I remember, it was further to the starboard so they could land a sling. 10 If it was in the spot where the grease is 11 indicated, they couldn't land a pallet right there. 12 What do these booms -- was positioned over 13 the starboard side of the deck; is that right? 14 One was positioned over the starboard side of 15 the deck, yes. 16 That's so you can lift the cargo up, lift it across, put it down on the starboard side? 17 18 That's correct. 19 That's how you loaded the deck cargo; is that Q 20 right? 21 A Yes. It's your recollection this boom was left 22 in an upright position when they finished work at No. 5 23 24 hatch? 25 Yes.

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Nielsen - cross/Delaney

It was left as the longshoremen had it rigged.

- Sometime before going to sea, isn't it necessary to put that in a secure position; is that right?
 - A Yes.
 - Q Does the crew of the ship do that?
 - A The crew do that.
 - 9 You recall -- strike that question.

Was it customary on the JILL CORD to grease the wire runners on the booms?

- A Prior to the first arrival on the eastcoast, they were lubricated slighly with some waste oil from the engine room.
 - You mean oil in contrast to grease?
 - A Yes.
 - Q It was oil; is that right?
- A You could compare it exactly to what your getting off your car when you make an oil change, the same kind of oil that just had been used for the auxilliary engines.

THE COURT: Did you see grease when you saw that spot as distinguished from oil?

THE WITNESS: It looked to me like grease.

BY MR. DELANEV:

Q The material you saw on the deck at No. 5

Nielsen - cross 'Delaney

which was pointed out to you where Tr. Pampillonia fell, did this type of grease, did you use that type of grease in any fashion aboard the ship?

A Not such a rather solid, what it looks like-it was materials for lubricating the blocks, the jim
block, the block where the cargo runner is running through.
They would use a number 2, light amber colored grease.

You use that for lubricating the blocks?

A Yes, the blocks where the cargo runs through has to be lubricated, but just slightly.

Q Isn't there one of those blocks right on top of the boom?

A There's one on top of the boom, yes.

Q That's where it starts, the cable starts down; is at right?

A Yes.

Q When you inspected the deck around No. 5 hatch, around 1:00 o'clock, was the third officer with you?

A No, he was not.

Q Did you see him around at that time?

A I saw him in hatch No. 4.

Q You say it was his job to take care of No. 4 and No. 5 hatch?

A Yes.

Nielsen - cross/Delaney

- Q At any time after he reported this accident to you, did you ask him whether he had been in the vicinity of where this accident happened before it happened?

 That he inspected this area before the accident?
 - A I do not recall.

MR. KAIN: If your Honor please, I object as hearsay.

(Record read.)

MR. KAIN: I do not object to asking the witness whether he asked it. I would object to any conversation between --

THE COURT: Objection overruled.

I'll allow conversations that this witness had. It's on the issue of credibility.

A I do not recall asking him, but it was his normal duties. I would not ask him. I have no purpose for asking him. It was his job to work around, to see the loading operation, see they don't damage any cargo, no unsafe condition occurred.

- While this box or something was being built around the deck cargo, would it be his job to routinely inspect the job being done?
 - A He would see what they were doing, yes.
- When you were at that hatch, at 1:00 o'clock, had they finished building the box aroundthat cargo?

	A 123
1	45 Nielsen - cross/Delaney
2	A They had not finished at 1:00 o'clock.
3	In addition to working on the starboard side
4	THE COURT: Excuse me one moment.
5	I'm sorry, you may proceed.
6	BY MR. DELANEY:
7	Q In addition to inspecting I mean in addition
8	to building the box on the starboard side, would it also
9	have been necessary to build some sort of additional box
10	on the port side where they loaded the extra cargo there?
11	A Yes, but more had to be loaded later from
12	hatch No. 4.
13	There was a 26 tons additional to be loaded, all to
14	be boxed as one item and lashed as one itme.
15	Q Do you recall when you went back to that
16	hatch after 3:00 o'clock whether they had commenced boxing
17	the cargo on the port side, No. 4 hatch?
18	A They have not finished the job at the port
19	side.
20	O Had they started it, started boxing the cargo
21	They're not starting yet. There was some
22	boxing done from Newport News where some cargo was loaded.
23	It was on board when we arrived at New York.
	Q There was no additional boxing done in

New York before or by 3:00 o'clock in the afternoon?

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Wielsen - cross/Delan ey

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Yes.

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of hatch 5?

That's up around here (indicating).

of No. 4 hatch, on the inshore side, could that person look and see someone standing about six or about two feet aft of the offshore corner of the No. 5 hatch?

A No.

Why?

No.

A Becuase there's an eight-foot masthouse inbetween that's covering all the area between the two hatches so it would be impossible from a desk level, at least, completely impossible.

- Q Is that shown in the photographs?
- A Yes, definitely.
- Q Could you show us which photograph would illustrate that, the best of the photographs (handing to witness.)

A These two photographs would indicate. This is what indicated best.

THE COURT: What photograph is that?

You mean from two feet from the forward end

MR. DELAMEY: T and T-5.

1	Nielsen - cross/Delaney
2	All the mast house and the gear on top.
3	Q So that the after end of No. 4 hatch, you have
4	to look right through?
5	A You have to look right through and no windows
6	or portholes.
7	MR. DELANEY: May I show that to the jury?
8	(Said photograph handed to the jury.)
9	THE WITNESS: If you can't look from hatch
10	No. 5 to hatch No. 4, that means it's the same as
11	you can't see in the opposite direction.
12	BY MR. DELANEY:
13	Ω Mr. Nielsen, who took these photographs?
14	A I don't know.
15	Q Were you there when they were taken?
16	A I was not present.
17	Q Do you know what time they were taken?
18	A After I had my coffee, I was down and
19	inspected this heavy lift loading. When I come up again
20	they were taken.
21	Q What time did you come up, what time did you
22	come out of the hatch?
23	A 4:30, maybe.

Yes. I don't have any exact time but I would

4:30?

1	48 Nielsen - cross/Delaney
2	say around 4:30.
3	Q In this photograph, T-5, in the background
4	of the photograph, it shows some cargo boxed in.
5	Is this the cargo on the starboard side?
6	A Yes, that's right. These gas cylinders
7	had been boxed in, poisonous gas.
8	Q In that photograph, can you see whether these
9	are also lashed?
0	A They are.
1	Q They are?
2	A Yes.
3	Q There are a couple of wires rung across that
4	you can see.
15	A Yes, and one going around.
16	Q One going all the way around?
17	A To hold the box together.
18	Q Do these lashing wires on that box cargo,
19	were they there when you were there at one o'clock?
20	A They were not on.
21	Q Were they on when you were there at 3:00
22	o'clock?
23	A I don't have a clear recollection whether the
24	wire was or not. The box was made.
25	Q But you have no recollection at this time

1 49 Nielsen - cross/Delaney 2 whether the lashing was on also? 3 Not a clear recollection. 4 Wouldn't this lashing, the lashing wires 5 obstruct the passageway walking aft on the starboard side 6 wouldn't you have to step over those lashing wires? 7 You would have to step -- they were on the 8 deck level. You would have to step over them. 9 So if they were there when you walked aft, 10 you're likely to have recalled it, wouldn't you? 11 Yes. You're right. 12 In your translation of the log book entry 13 concerning the accident, Mr. Nielsen, you used the word 14 "fell on the deck off number 5 hatch." 15 A Yes. 16 Is that a direct translation, "off" or you 17 mean "near"? 18 It doesn't say -- in Danish you can't translate direct. It's just "off." It doesn't indicate how many 19 20 feet it was. Does this mean falling off the top of the 21 Q hatch? 22 23 No. 24 It means near it, in other words? Q

On the main deck.

Nielsen - cross/Delaney 50 1 I think in one of those photographs you said 2 there was a reel of wire there. 3 Yes. 4 Would you show me in which photograph that 5 was? 6 Yes. Here, the reel here (indicating). 7 That's also in photograph T-5, right? 8 You see, this is a support for the reel, 9 (indicating). 10 I see. 11 The reel goes in here. 12 THE COURT: A little louder. I want the jury 13 to hear what you say. 14 THE WITNESS: There's a part for the reel 15 where you coil the wire around when you are at 16 sea, when you don't use the wire, coiling. 17 The support you are talking about is in 18 T-1; is that right? 19 Yes, that's correct. 20 Right. 0 21 The front of the picture. 22 It's in front of the picture, yes. 23 Do you know at the time of the accident 24

whether there was any wire on that reel?

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Nielsen - cross/Delaney

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2	A There was no wire. It's the ship's crew that
3	had been taking it apart to chip the rust, paint on it.
4	It had been chipped.
5	Q I don't mean the support. I mean the real
6	itself.
7	A No wire on it.
8	Q No wire?
9	A No, they couldn't pain and chip rust if there
10	was wire.
11	Q Had they taken the wire off the reel?
12	A Yes.
13	Q Had it been put on the booms or something?
14	A No, it's a mooring wire, so the wire was
15	taken aft and used for mooring.
16	Q That's the same lines you use all the time?
17	A The same type, just another. We need many
18	of them.
19	Q Mr. Nielsen, do you remember if there was
20	any cargo at all boxed in aft of No. 5 hatch?
21	A No.
22	Q You don't remember or there wasn't any?
23	A There was not any.
24	MR. DELANEY: No further questions.

THE COURT: Mr. Cohen.

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Nielsen - cross/Cohen

	Q	When	you a	ws	that	grea	3e &	3:00	0 0	'cloc	k,
that	you have	here	d e pic	ted	d on	the b	lack	ooard	wi	th th	ne X
and f	the circle	e, did	that	gı	rease	have	the	look	to	you	as
if so	omeone had	d step	ped i	nto	it?						

A The top surface, was rather flat like a pancake. It wasn't -- I don't know how to explain it. It was flat. It was not a very thick layer.

- Q Did it have a footprint in it?
- A I don't recall.
- Q Was it in a fairly regular shape or was it an irregular shape?
 - A I would say an irregular.
- Q Was it more round than square or how would you describe it?

A More like a pancake where you put it out on the pan. It's an irregular shape, round, more or less round. It was not exactly -- not a square one like a picture (indicating) irregular, round.

THE COURT: We'll suspend for lunch at this time. The case will continue at 2:00 o'clock when Mr. Dorfman will cross.

MR. COHEN: Could we mark that blackboard?

THE COURT: Mark it as an exhibit.

You're directed to make a photograph of it.

Nielsen - cross/Dorfman

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0 This was a rusty old wire, wasn't it?

This wire?

No.

Q Isn't that what you said, it wasn't for ten years you did any work?

A I didn't say the wire was ten years. It wouldn't last ten years. The reel wouldnot be dismantled within a time of ten years, if you did a good job on it.

Q Well, were you there when the pictures were being taken?

A I was not present.

Q You don't know whether this was taken at 3:00 o'clock, ten after 3:00, 4:00 or 5:00 o'clock or later that evening, do you?

A From the pictures, I can tell by this time of the year the shadows -- you can also see the shadows that it couldn't have been late in the afternoon, wouldn't you agree?

> 0 Yes.

> > THE COURT: Let the lawyer ask the questions.

Let me ask you how do you know it was April 3rd and not April 4th, the shadow the same time of day would be the same, would it not?

THE WITNESS: I'm sorry.

1	Wheeler - direct
2	WILLIAM WHEELER , was
3	called as a witness herein, and having been first
4	duly sworn by the Clerk of the Court, was examined
5	and testified as follows:
6	DIRECT EXAMINATION
7	BY MR. KAIN:
8	Q What's your present employment?
9	A Self-employed as a marine surveyor marine
0	consultant, principally here in the port of New York.
1	Q Will you, Captain, tell his Honor and the
2	ladies and gentlemen of the jury your background in the
3	marine industry?
4	A 1935 I was graduated high school. I went
15	to sea as a deckhand, ordinary seaman.
16	In 1938 I was enrolled in the Maritime
17	Commission Cadet Training Program. I was graduated from
18	that course of training with a third officer's license in
19	1941, the latter part of '41.
20	I sailed as third officer, qualified, passed
21	the examination for second officer, similarly for chief

officer.

In 1945, I passed the examination as Master of American Flag Vessels, any water, any tonnage.

I sailed continuously as Master in 1948 when I

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of it is to insure that the threaded rod that makes up the turnbuckle is lubricated satisfactorily so that it can be taken up, the sloak can be taken up in it after a few days of weather at sea.

This is black iron. The turnbuckles are usually ordinary steel. They have a tendancy to rust sightly. They can stiffen or freeze up in 48 hours.

MR. KAIN: Is it also necessary they be easily turned when the ship is at sea with a spike instead of a bar?

THE WITNESS: Yes.

MR. DELANEY: There isn't one bit of evidence in this case that these lashings were put in place before this accident. As a matter of fact, the testimony --

THE COURT: That's a fact question. The testimony appears to be that it was not, but that's not determinative.

MR. KAIN: If your Honor please --

THE COURT: If grease was used, grease would be brought onboard by the stevedore and not part of the ship's equipment, right?

MR. DELANEY: What he's going to get to is the

Wheeler - direct

witness. Maybe we can get a concession.

MR. KAIN: It has to do with, possibly,
-- I haven't actually decided, your Honor, but I
may produce moving pictures of the plaintiff
taken while he was under surveillance.

THE COURT: There's no concession on that.

MR. DORFMAN: May I ask, do you intend to charge the jury it doesn't matter where the grease came from?

THE COURT: That's right.

The only question is whether the place where the plaintiff says he slipped was in a reasonably safe working condition, reasonable safe place to work.

The doesn't matter how the condition came about.

MR. DORFMAN: I think would suggest possibly a directed verdict might be in order.

THE COURT: That's a good suggestion for the plaintiff but I won't take it.

MR. DORFMAN: Since we have an absolutely non-delegatable duty ---

THE COURT: I know all the cliches, general charges. Obviously, this is not a case for

Wheeler - direct

directed verdict.

Obviously, I repeat, there's a real question of fact as to where he slipped. The mere fact that there was grease on board ship doesn't matter if he didn't slip on it. You and I know that.

That's basic.

MR. DORFMAN: I thought the log had obviated that problem.

THE COURT: I know you thought so. You look at it a lot differently than I. I try to see it impartially. I'll excuse Captain Wheeler when the jury comes in.

THE WITNESS: Fine.

THE COURT: I think I can make my doctor's appointment now.

I was going to give that up but he said if I come in, -- so as soon as this is over, on we go.

MR. COHEN: He discontinues against me today?

THE COURT: Can he?

MR. COHEN: He told me he would at the end of the day.

THE COURT: Would you like me to ask him?

MR. COHEN: Please.

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THE CLERK: Diagram marked as Plaintiff's Exhibit 12 in evidence.

(So marked.)

THE COURT: Mr. Cohen, do the parties agree that Plaintiff's Exhibit number -- the courtroom exhibit on the blackboard be marked in evidence?

MR. COHEN: Yes, your Honor.

THE CLERK: So marked.

THE COURT: Seat the jury.

THE CLERK: Diagram on blackboard marked Defendant's Exhibit U in evidence.

(So marked.)

THE COURT: Seat the jury, please.

(Jury enters courtroom.)

THE COURT: The defendant Concord Line at this time is withdrawing Captain Wheeler.

You may step down.

THE WITNESS: Thank you.

(Witness excused.)

THE COURT: I don't recall that Captain

Wheeler answered any questions but if he did, all his
testimony is stricken. Just disregard it.

The defendant, Concord Line had a claim offer against International Terminal Operating,

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12/17/73

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THE COURT: Are you insisting on the jury trial on the claim over?

MR. DELANEY: Your Honor tells me to avoid any possible grounds for an appeal and I would rather withdraw the claim than have it in chance.

I would leave the indemnity issue to your Honor.

THE COURT: Do you have any objection to that, Mr. Kain?

MR. KAIN: I objected, if your Honor -- well, no.

THE COURT: What clouded the issue was that I gran. d a jury trial because International Terminal Operating was in and I felt since they had one issue, they might as well have both, but since they are out and Mr. Delaney consents, I'll just vacate that order and under that I can try it nonjury.

The reason I'm interested is because as you may have guessed, I have two juries today and the extraordinary pressure I have in trying cases has been what we say in medicine and elsewhere, exacerbated.

If the jury comes back and I can't try the non-jury claim with the additional testimony -I'll try to do that. I see Capt. Wheeler here.

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I'll do it. It makes it more flexible.

MR. KAIN: May I inquire as long as your Honor is taking this non-jury --

THE COURT: On the claim over, will you gentlemen agree on counsel fees if I decide you are entitled to it or do I have to take testimony on that?

MR. KAIN: IN the years I have been doing this, your Honor, we have also, at least I have where I could followed this system where counsel, with the consent of the trial judge, we have attempted to agree on it if we can agree on it and heretofore, I've also done so, if we can, we settle it. If not we reserve our right to come back before the trial judge.

THE COURT: May I decide this, decide the claim over without determining the issue of the reasonableness of the counsel fee and if I decide in favor of the shipowner and then if you can't agree, then you might be able to do it on paper, or oral testimony.

MR. KAIN: I would prefer to do it.

MR. DELANEY: Agreeable with me.

THE COURT: I would like to bring the jury, just to tell them where we are. I would like to find out who is here. I would like to give them a

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menu for lunch and somehow soothe any irritation they might have because of the delay.

I think the fact they have come here in such weather entitles them to a meal whether I charge them before lunch or not. Suppose we bring them in.

(Jury enters courtroom')

THE COURT: Good morning.

I thought I would count the hearty souls that did make it.

THE CLERK: We have one from Smithtown and one from Babylon.

THE COURT: The Long Island Railroad is as much as three hours late. Whatever happens today, I'm going to order lunch in today. I think the Government should show its appreciation for the effort you made in getting here by at least giving you lunch in and saving you from the effects of the brutal weather.

I will give you the menu and you make the assip. Each juror make out a slip showing the shoice or her choice of a sandwich, beverage, dessert.

We will get those orders in and try to get lunch in by 12:30.

I the meantime, we can do that, my courtroom

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THE CLERK: New York Shipping Associaton, threepage document marked Defendant Concord's Exhibit Z in Evidence.

(50 marked.)

THE CLERK: The top sheet is dated December 10, 1973, continuation, part of Exhibit Z.

(So marked.)

MR. KAIN: with the offering of this document, your honor, the defendant rests.

THE COURT: Any objection?

MR. DORFMAN: No objection.

THE CLERK: Previously marked.

MR. CUNNINGHAM: Does your honor wish me to reserve my motions or should I renew them at this time?

THE COURT: Both sides rest?

MR. DORFAN: Plaintiff rests.

THE COURT: Mr. Delaney rests?

MR. DELANEY: Your Honor --

THE COURT: This is only on the plaintiff's claim against the ship.

MR. DELANEY: On the plaintiff's claim against the ship, Mr. Dorfman has asked me to stipulate as to how much was paid in compensation benefits.

THE COURT: That was my question here.

MR. DELANEY: I have it written out.

unreasonably inspection should be obvious. It has some little application in this case, where some-body takes one step on deck and takes a slip.

There might be inferences this came from the carpenter and the carpenter was working a long time and he could have gone back and forth to get lumber even if he says that shouldn't have happened and maybe should have known about it.

MR. KAIN: Your Honor, the testimony isn't uncontroverted, the grease was at the forward corner of the hatch as plaintiff contends.

THE COURT: 23, I'll grant, on the issue of contributory negligence.

Same thing with 24, 25, 26, 27, 28, 29. I'll deny 30 for the same reason indicated and 31.

I'll grant 32, 33, 34, 35 and that's it.

Mr. Delaney, are you ready to sum up?

MR. DELANEY: Yes.

THE COURT: Seat the jury.

MR. KAIN: Before we proceed, is your Honor going to submit a special verdict?

THE COURT: Yes. This is the form of verdict (indicating). I'm not going to hear argument on this now. I want to get a summation in if possible before lunchtime.

CHARGE OF THE COURT

I know both lawyers have commended you for your obvious sincerity and dedication and I want to commend you for your heartiness and your good health and your ability, somehow, to get here through what has been described as probably the worst storm that we have had in New York.

I don't know how you accomplished it but you did.

We have reached that point in the trial where it becomes my duty to charge you on the applicable law. On every jury trial there are three areas of participation:

First, we have the lawyers who represent clients. They are partial and that is how it should be. The lawyers in this case have done an excellent job presenting their position of their clients through the evidence that they have produced and the argument they have made before you.

That is why it is called an adversary system.

There are parties on both sides of an issue. They contest over it. The theory is that if you have competitors developing their point of view, the evidence will be unfolded for the jury to see. That

Charge

is the lawyers' function.

The other two areas of participation are the jury, of course, and the Court. Both are judges. Both are impartial as distinguished from the activity of the lawyers, but within each sphere is the authority to decide the particular matters that are allocated to it.

The jury decides the facts. The jury and the jury alone decides what happened here from the facts.

The Court, on the other hand, is the sole judge of the law and all during the trial the decisions I have made are matters of law.

We must each respect each other's authority so that I understrad and I leave solely with you the fact questions.

On the other hand, you must and it is your duty to leave solely to me the law question. So that you must accept the law as I charge it. You might not like the law. You may think you could have fashioned the law. You would be violating your duty if you violated the law and go off on your own or apply a law that is better or more just. You must apply the law as the Court charges it.

Charge

The plaintiff, Dominick Pampillonia, sues the defendant, Concord Line for personal injuries he claims he sustained on April 3rd, 1969, at about 3:00 p.m. while he was working as a longshoreman on the starboard side on the upper deck, which is called the weather deck of the ship, JILL CORD.

He says that acting under the direction of his foreman, he went for a saw which was located near the No. 5 hatch and as he turned the corner or the coaming, around the coaming of the No. 5 hatch, he slipped and fell on some grease.

He says he suffered some damage, nerve damage to the lumbar sacral area of the spine and some injury to his right shoulder and to his wrist and fingers of his right hand. That, generally, is what the plaintiff claims.

Now, the defendant Concord Line, of course, denies this claim and in addition says that any injury that the plaintiff suffered was due in whole or in part to the negligence of the plaintiff.

I ask you to leave aside any question that was injected into this case by reason of the claim by the shipowner, Concord Line, against the C.C. Lumber Company, Inc., which is the plaintiff's

We will just consider the case as solely one between the plaintiff, Dominick Pampillonia, and the defendant snipowner, Concord Line.

Of course, in treating these parties, they

employer. We will leave that for a later time.

will be treated fairly. That means equally. No kind of sympathy should be generated in favor of the plaintiff because he is an individual and employee nor any kind of bias against the Concord Line because they are a shipowner and own a ship.

Everybody in this court is of equal height. We are deciding issues here. We are not here to try to equalize assets; take any money from one to the other.

If the plaintiff is right, then he is entitled to recover; if the plaintiff has not proven he is right, he is not.

Basically, that is what we mean by fair treatment.

In every case where the plaintiff brings an action for personal injuries, the plaintiff has the burden of proving that claim,

In this case it is the breach of warranty

of seaworthiness and, that breach of warranty

And then the third element of his claim is the nature, extent, duration of each and every injury he claims. That is the plaintiff's burden.

proximately caused the damage he claims.

The defendant, claiming that the plaintiff negligently contributed to the happening of the accident, the injury that he claims he incurred, must prove that the plaintiff was contributorily negligent.

For the moment, we will just talk about the plaintiff's burden: Liability, proximate cause, damages. The plaintiff must prove his claim. By that I mean all the elements of the claim, those three elements of the claim, by a fair preponderance of the credible testimony.

The defendant, on the other hand, must prove the contributory negligence of the plaintiff-they assert that; they make that claim -- by a fair preponderance of the credible testimony.

What is the fair preponderance of the credible testimony? It means the plaintiff must prove on

Charge

those three elements and the plaintiff must prove on contributory negligence that it is more likely so than no.

You weigh all the evidence in the case, the testimony of the witnesses, the exhibits marked in evidence, regardless of who called the witness, regardless of who offered the evidence. All the credible, the believable evidence on one side and then on the other side, all the credible evidence opposed to that position.

Symbolically, if you find it is evenly balanced, then the plaintiff has failed to establish his burden of proof. Then you must find for the defendant if you find that. Then, the evidence did not preponderate, did not weigh more heavily than that opposed to his position.

However, if the plaintiff proves his case, that means that it does preponderate, no matter how slightly, then you will find in favor of the plaintiff.

The same thing is on the other issue by the defendant. If the defendant brings in evidence that is equal to the plaintiff on the issue of contributory negligence, then the defendant shall

have failed to prove its claim of contributory negligence; however if the defendant proves, no matter how slightly, that it was more likely so and that the plaintiff was contributorily negligent, then you must find for the defendant on that issue.

The important duty of a jury is to assess the credibility of the witnesses. You determine their believability. It is not necessarily

a witness lied on a particular matter. It is more than that. You must take into consideration whether the witness was in a position to testify as to those matters or was in a position, rather, to see and hear those matters to which he testifies.

It may have been a position where he saw
part of it or heard part of it and under examination
is prodded to testify to a little more than he has
a definite recollection of. The witness may testify
as to his belief as to matters, indicating some
knowledge, but not complete, as to the matters;
telling you that he does not have a deep conviction
of the particular testimony he has given or the
statement he has made.

Assessing credibility, as I say, is more than

the simple determination of, "Well, is he telling the truth or isn't he?" It means weighing the testimony of each and every witness. When you do that, you must take into consideration a number of factors.

This is not an alien experience for you.

You have been doing it during all your social and business life. You are used to judging what people say, what your own children tell you, what your respective spouses tell you, what your friends tell you.

you in order of importance, but among those many factors is the interest that a party has in a case. Whether the testimony is contradicted or disputed or whether it is corroborated by other testimony in the case. The way in which the verdict will affect each party. The intelligence of the witness testifying. The manner in which the witness answered questions. Did the witness strike you as telling the truth? Was the witness evasive?

Evidence offered that a witness on a prior occasion made statements inconsistent with his present testimony is called impeaching evidence.

As an example, the defendant offered the plaintiff's income tax returns and a loan made to the Manufacturers Hanover Trust Company. The income tax return was not offered to you for any other purpose than to show, if it does show, that the plaintiff made an inconsistent statement on the income tax return, to show that it was also inconsistent with the plaintiff's position that he was unable to work. In other words, he said he had income that he was earning.

The same is true for the application he made to the Manufacturers Hanover Trust Company.

The defendant is in effect saying when he made the application he was employed by the ILA, International Lor, shoreman's Association. When he said that, was it inconsistent with the testimony and if you remember, in effect, he was saying that he was employed there.

You have a look at that statement. You determine what the surrounding circumstances are.

You make the determination as to whether it is in fact inconsistent and if you find it inconsistent, you determine whether it is inconsistent as to

a material or immaterial fact. On the

basis of that, and all the other factors in the case, you make your determination as to the credibility of the witness. In other words, in weighing and judging his testimony.

Of course, to try to be evenhanded here,

I do not know whether the log was offered as
inconsistent testimony with the position of the
defendant, but you may consider that. Determine
whether it is inconsistent with the position of
the defendant in how the accident happened.

If you find that a witness knowingly testified falsely under oath as to a material matter, you may disregard all that witness' testimony on the theory that that witness is unworthy of belief. On the other hand, and to underscore the wide discretion the jury has in weighing testimony, you can decide to accept part of the testimony, that which you do not recognize as being patently false.

All during this trial and from the very start, you were told you have a duty to render a true and just verdict. That, in turn, meant that you are required to render this verdict solely on the basis of the record, the testimony given in court and free of all bias, prejudice or sympathy.

What does evidence consist of? It consists of the cral testimony, the exhibits admitted into evidence, the stipulations of counsel.

of course in making your determinations,
you are free to make reasonable inferences based on
your good common sense and experience from the facts
established, from the record.

In defining what is the record, the basis of your determination, it might be helpful to instruct you on what is not part of the record. The statements ande by counsel in the opening and closing are not part of the record. They are helpful devices in aiding you in arriving at a just verdict and finding the truth, but they are not evidence.

The opening is to advise you as to the position of the respective parties so that you will more reasonably follow the evidence, and the closing, of course, is an argument on the evidence, presenting on behalf of the defendant, a theory of exculpability which means not negligent, that they did not breach the warranty of seaworthiness.

On the other hand, on behalf of the plaintiff, that the defendant is in fact liable and they breached

their warranty of seaworthiness. The important thing to remember is that the statements made by counsel in opening and closing is not evidence, not part of the record.

Made during the trial. I am not a witness, I am not subject to cross-examination. Just disregard anything I may have said. I have no opinion.

As to the ultimate determination in this case, I train myself not to even think of the merits. That is up to you. I leave that with you. I am here solely to see to it that both parties are treate fairly and in that attempt, and in setting that goal, I must free myself from taking sides.

If I should have an opinion I am lost, I cannot do my job effectively. Any statements
I have made that might conceivably be indicated or be indicative of the position that the Court took should be totally disregarded by you.

The same is true of any question I asked.

Do not place any special emphasis on the questions that the Court may have asked. The only reason I asked, if I did, and I cannot remember how many I asked, is to clear up or hopefully clear up some

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confusion that existed in my mind because I might have thought if it existed in my mind, it would exist in yours.

I am interested in clarifying as many of the fact and legal issues that I can in this case.

The important thing to remember is that the determination is yours.

In defining what the record is, you must disregard any answers that are stricken from the record. In other words, if it is not in, you may not consider it. If it is stricken even physically from the record, it should be expunged from your mind and out of your consideration.

Also, you may not speculate on what an answer to a question might have been if the Court permitted a witness to answer. There are times when a question was asked and I sustained the objection to the question. I merely did that as a matter of law.

You cannot wonder about what the answer would have been. Again, it is not in the record, so that you may not consider it.

We talked about evidence. I should like to define two types of evidence: One type is direct evidence. The other type is called circumstantial

evidence.

Direct evidence is testimony given by a witness of what that witness saw or heard. Circumstantial or indirect evidence, on the other hand, is the finding of a fact by making inferences based on reasonable good common sense from established facts.

If you were sitting here as a jury in another type of personal injury claim, let's assume the plaintiff in that case claimed the defendant passed a Stop sign without stopping and caused certain personal injuries. The issue in that case would be whether or not the defendant passed a Stop sign without stopping.

To give you an example, you must first identify the fact in dispute because evidence is the means by which the law establishes the existence or non-existence of a fact. Again, let us assume the plaintiff in the hypothetical case sued the defendant because, let us say, the plaintiff was a she and the defendant was a he. She was knocked down by the plaintiff's car. The basis of the liability there is the fact that the defendant failed to stop at a stop sign.

Let us assume my courtroom deputy, Mr. Adler, and myself, are potential witnesses on the case because we were on the street corner at the point that the Stop sign was established. I was facing the roadway and saw the Stop sign. He, on the other hand, had his back to the Stop sign. We were talking at the particular moment and place where the accident happened.

If I were called to testify, I might testify that the defendant's 1973 white Cadillac, coming down the roadway at 60 miles an hour passed the Stop sign and struck the plaintiff. That is the direct testimony on that issue; that the defendant's motor vehicle passed the Stop sign without stopping. I saw it. I am testifying to what I saw.

Mr. Adler is also a witness, but not to the fact of the motor vehicle passing the Stop sign.

What he might testify to is that as he was speaking with me, within his peripheral vision, came the defendant's motor vehicle travelling at about 65 miles an hour. Then, for about 150 feet, and about two or three seconds later, when he turned to the left, he again saw the same motor vehicle travelling at about the same rate of speed and struck the

plaintiff.

One is the direct evidence of passing the Stop sign. The other is indirect evidence because on the basis of his testimony that the car was travelling 65 miles an hour, that he didn't see it, it was out of sight for 150 feet and two or three second later, he saw it again, from those established facts that the car traversed 150 feet in two or three seconds, I think you would agree with me that good common sense and experience would indicate to you that the motor vehicle passed the Stop sign without stopping, so that on one hand you have direct evidence of the fact; on the other hand you have circumstantial or indirect evidence.

The law does not hold that one type of evidence is of better type of quality than the other.

It requires the plaintiff to establish the claim by a fair preponderance of the credible evidence, both direct and indirect. On behalf of the defendant to establish contributory negligence by direct and indirect evidence.

Let us turn to the claim itself and analyze the claim. The plaintiff claims that the defendant

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Shipowner breached its warranty of seaworthiness.

Under maritime law, every shipowner owes to every longsmoreman employed aboard the vessel the non-delegable duty to maintain the ship and its decks and passageways in a seaworthy condition at all times.

To be in a seaworthy condition means to be in a condition reasonably and suitably fit to be used for the purpose used and intended.

The standard is not perfection, but reasonable fitness for the use intended.

In this case, the deck is used for the stowage of cargo and used as a passageway to and from places of work and they are in fact places of work.

The presence of the grease alone on the deck does not in and of itself constitute a breach of the warranty. The question is whether the grease created a condition so that that portion of the deck was no longer reasonably fit as a passageway.

To say it another way, when someone comes on board ship, the shipowner warrants that the employee will have a reasonably safe place to work.

Liability for an unseaworthy condition does not in any way depend upon negligence or fault or

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blame. That is to say that the shipowner is liable for all injuries and consequent damage proximately caused by an unseaworthy condition existing at any time even though the owner may have exercised due care under the circumstances and may have had no notice or knowledge of the unseaworthy condition which proximately caused the injury or damage.

In other words, the question before you on the issue of liability is the condition of the snip, not what the shipowner did, not what its officers or agents did.

A shipowner is not an insurer. He does not have to furnish an accident-proof ship. He is required to furnish a ship and I am specifically referring to the deck and the place of the accident, that is reasonably fit as a passageway and reasonably safe as a place to work.

The jury may not draw an inference of liability from the happening of the accident alone. The plaintiff must prove by a fair preponderance of the credible testimony, the shipowner, the defendant, breached its warranty of seaworthiness, its warranty of fitness for use.

Concentrate for the moment on the question

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of liability, breach of warranty of seaworthiness, and leave aside the issue, for a moment, of contributory negligence. I will discuss that later.

The plaintiff, coming on board ship, does not assume a risk of injury from any seaworthiness of the vessel.

You have before you a form of special verdict. The first question you reach is the question of liability, that is: "Did the defendant breach its warranty of seaworthiness?"

I was reminded that the plaintiff in its opening talked about charging the shipowner with negligence. That is not in the case. The plaintiff at this point makes no claim of negligence. The claim rests on a claim that the defendant breached its warranty of seaworthiness, failed to have the ship reasonably fit for use, the use intended and in the framework of this case, failed to have the deck, that portion of the deck on the starboard, offshore side reasonable safe for the longshoremen, either as a place of work or for passage to and from work.

If you find that the plaintiff has sustained its burden of proof, proved that by a fair

Charge

preponderance of the credible testimony, your answer is, "Yes." If you find that the plaintiff failed to sustain the burden, then the answer is "No." If the answer to that question if "No," you go no further. That disposes of the entire case.

However, if you find that the defendant breached its warranty of seaworthiness, you move to the next question: "Did the breach of warranty proximately cause injury to the plaintiff?"

As an example, if I were standing here

(indicating) and waving my arms about and let us
say I breach some warranty in doing it, so I can
keep it in the same concept of liability, and as I was
waving my arms about here, my courtroom deputy came
through the door and tripped over the chair and
was hurt. Well, you can see the absence of cause
and effect. There is a break in the chain. So
there would not be any proximate cause. It does
not matter that someone breached its warranty for
these purposes if there is not proof of proximate
cause.

On the other hand, if while I was waving my hand about, my deputy came through the door and

hit him in the fact causing injury, there the cause is obvious. Then there is proximate cause.

An injury or damage is proximately caused by an act or failure to act whenever it appears from the evidence in the case that the breach of warranty or the act or omission that was the basis of the breach or warranty played a substantial part in bringing about or actually causing the injury or damage and that the injury or damage was either a direct result or a reasonable consequence of the act or omission.

Again, the plaintiff must prove by a fair preponderance of the credible testimony that that breach of warranty caused the injury. If the plaintiff fails in that, you do not answer any of the other questions. However, if the plaintiff has sustained its burden of proof on the issue of liability, and on the issue of proximate cause, then you reach the question of damages.

Of course, instructing you on damages, I do not mean to indicate any view as to how you should find in the case. I instruct you on damages only because you should know what the law is in the event you reach the issue.

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What is the plaintiff entitled to? The plaintiff is entitled to the reasonable value of the loss converted into dollars. Damages are never punitive. They are not intended to punish. The idea, or the concept is to make the plaintiff whole. The only way we know of to make the plaintiff whole is in money damages.

First, you take into consideration what we call special damages, the out-of-pocket expenses to date. The plaintiff must prove the nature, extent, duration of the injury and, of course, that it was proximately caused by the breach of warranty. If it was caused by something else, obviously, then the defendant should not be charged for it, only to the extent that this breach of warranty caused or enhanced the injury.

So, in special damages, the reasonable value not exceeding the actual amount paid of all the medical and hospital expenses, the reasonable value in dollars, of all the pain and suffering todate. We call that general damages. Pain and suffering does not mean alone the actual pain that the plaintiff felt or experienced. It means all the limitations imposed by the injury, his inability to walk

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long distances, to stand long periods of time. Whatever else that implies.

In addition, the plaintiff is entitled for all future loss, prospective loss. Obviously, when it comes to predicting future loss, there are a few factors which are more or less uncertain, one of which is the length of time the injury will persist, if you find it does persist beyond the present, if it is permanent, how long the plaintiff will live, how it will affect his earning capacity.

Of course, coming back to the present loss, the loss at the present time, you may, of course, -- not you may -- it is your duty to reimburse the plaintiff for all his lost wages.

First, you must find that the plaintiff in fact did lose wages because and as a result of the breach of warranty.

If you find that he aid, then you must determine how much of it is reimbursable. In this ca e, the plaintiff received an annual wage, guaranteed annual wage. You know what these figures are. If you do not, it has been recorded. Under the system, the plaintiff, having received a compensation award, was given a certain amount of

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money every week by reason of his injury in the form of compensation. I recall the figure being \$50.00 a week but your recollection is what counts.

The annual wage was fixed and then reduced by the amount of his compensation aware which means he could not get more than the annual wage. You must remember that to the extent he received his annual wage, he suffered no loss; so that at this point, we have no loss of wages except that you might find that he might have gotten some overtime. If he lost that and that was reasonably attributable to the injury, of course, you may award him that loss.

If you give the plaintiff a verdict, the amount he received through compensation must be returned to the compensation carrier. He cannot be paid double. He cannot hold his compensation and at the same time receive your award for that portion. He must give it back, but the point is that you must take that into consideration, the money that he has to give back to compensation, that will be part of the loss. That you may reimburse him for.

I charge you that in the event you find

against the plaintiff and he recovers nothing in this action, he does not have to pay back what he received in compensation. He pays it back only if he wins here.

Let us talk about the future. If you make an award for all his future loss of earnings, then he, again, will not receive compensation because if he got it, he would have to pay it back. But you are giving it to him in advance. Again, he is not entitled to receive it twice. Your award should take into consideration for the future that he will not receive compensation beyond this date.

Again, do not award him any money that represents payment under the guaranteed annual income that has been referred to as the GAI because he suffered no loss if he received money during the period that he is entitled to receive his guaranteed annual income.

How about future pain and suffering? Well, you determine, first, how long, if you find he has it to date, how long he will suffer from the pain and other limitations. If you find the injury is permanent, then you must determine how long he will live. Of course, you do not know how long he will

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live, but you must base

it on everything you know about the plaintiff; his age -- as I recall he is 29 years old at the present time -- the condition of his health. You might take into consideration the life expectancy tables which say he is expected to live 41.9 years.

This table is based on statistics gathered by the Government through the Department of Labor. Every ten years, as you know, they ask a lot of information and part of that information is used in making up these tables. It just means the average life expectancy is expected to be 41.9 years for a white, male, age 29. It is just a guide. do not know whether Mr. Pampillonia will expire through some accident or something tomorrow or whether he will live to the Biblical 120. We do not know. 41.9 years is just a figure that you may used as a guide, taking all the other factors under consideration.

If you award future damage, loss of wages, pain and suffering -- incidentally, you may take into consideration future medical expenses that are made reasonable necessary because of this injury -not any other injury or other illness he might have Charge

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suffered. This injury.

Again, you would be awarding him money now for a future loss. Well, the law requires that you discount that award to present value. What does that mean? If you were to be paid one dollar a year over the next ten years and discount that at five percent, which means that \$10.00 is worth more today, getting it in a lump sum than waiting ten years to get it .-- you will agree to that -- that \$10.00 is worth \$7.72.

If you were paid one dollar a year over a period of fifteen years, that \$15.00 would be worth \$10.38. If you were paid one dollar a year for twenty years, that \$20.00, discounted at five percent, would be worth \$12.46. If you were paid one dollar a year for thirty years, that \$30.00 would be worth \$15.37 discounted at five percent and if you were paid one dollar a year for forty years, that \$40.00 would be worth \$17.00, present worth discounted at five percent.

You are also advised that any award that you may give this plaintiff is not subject to any Federal or State income taxes. The award is free of all Federal and State income taxes, the theory

teing this is not income, but again, to make the plaintiff whole for the injury he suffered, rather than income.

The plaintiff has a duty to mitigate, we say, to hold down, keep down any damage. The law requires that he act reasonably in the premise, first that he do nothing or that he do reasonably nothing to aggravate the injury and secondly, that he uses reasonable care in avoiding increasing the injry and affirmatively, to reduce it. He must be reasonable under the circumstances.

In claiming a loss of wages, you decide whether this plaintiff acted reasonable in attempting to perform work that he could perform, taking into consideration the limitations imposed by the injury. You decide whether, taking into consideration his intelligence, his training, his ability, he could have been retrained to perform other occupations.

The defendant claims that with the plaintiff's relative youth, his training in certain fields as a hairdresser, ironworker, he could have been retrained either as a checker at the piers as a longshoreman at no reduction in wages or at any rate,

he could have been employed as a hairdresser or ironworker or any one of the various occupations that Dr. Slater, I think was the name, pointed out that he could be employed as. You find if the plaintiff acted reasonable.

The plaintiff, on the other hand, says
the pain is severe, that though there are periods
of remission, there are periods of exacerbation
where he suffers severe pain in his back and
lower extremities, that renders him unemployable.
You decide that. Those are the fact issues for you.

The whole idea in compensating him for past and future loss of wages is to compensate him for his loss of earning power. You decide for how long, if you find he lost earning power, he lost it.

Normally, we say that at age 65 that is the time when longshoremen -- or, you decide whether that is the age.

The defendant argues that that is the point that longshoremen normally end their economic life. You do not have to accept that age as the age, but that is one of the ages argued to you.

After taking all those factors into consideration, and I am talking about the medical

expenses, the loss of wages, both present and prospective, future, the question as to when, if the plaintiff did in fact lose wages, if he did.

The question as to whether the plaintiff was reason-

able in failing to seek work.

Take into consideration that he has received guaranteed annual income under the union contract.

Take into consideration the fact that out of any award, what he has received to date, out of compensation, it must be returned to the compensation carrier. You fix, in dollars, the amount you say the plaintiff was damaged.

Again, the plaintiff must prove the nature, extent and duration of each and every item of damage, as to both what I have classified as general, as pain and suffering and special, money out-of-pocket, money he will have to expend out-of-pocket. That would be the plaintiff's claim.

Now, having found for the plaintiff, if you do, then you turn to the claim of the defendant that the plaintiff was contributorily negligent, that he contributed to the happening of this accident and the injury that he claims.

What is negligence? Negligence is the failure to exercise ordinary care. It is the care required

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of reasonably prudent persons in the management of their own affairs to avoid injury to themselves and to others.

Ordinary care is that care which a reasonably prudent longshoreman would erercise under all the attendant circumstances.

Negligence is the failure to do that which a reasonably prudent longshoreman would do or in doing something which a reasonably prudent longshoreman would not do.

In other words, the standard is reasonableness under all the circumstances. Would a reasonable longshoreman under those circumstances have looked and seen the grease on the deck? I am assuming you find it was there about where the plaintiff says it was and that that was the basis of the breach of warranty and that proximately caused the injury.

If you find that the defendant has proved by a fair preponderance of the credible testimony that the plaintiff was negligent in the manner in which he walked, went to seek out the saw, then you will answer question 4, "Yes."

If you find the plaintiff has failed to

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establish (sic) negligence, by a fair preponderance, then you will answer that question, "No."

If you answer that question, "No," then you do not answer 5, because then it would come to the percentage. If you answer ,"No," you found he was not contributorily negligent.

You answer 5 if you find only that he was contributorily negligent. Then, you determine how much. Was he two percent negligent? Five percent? Ten percent? Fifty? Sixty percent, seventy? Ninety? Ninety-eight percent? You put that percentage down. That percertage will be used to reduce the amount of damages because again, the plaintiff will have to bear his fair share for causing the accident.

If you have awarded the plaintiff damages, well, for every dollar you award him, if you find he was two percent negligent, you will put two cents for every dollar, if you find ten percent, you will find ten cents. 98 percent, 98 cents.

Then you will put the final figure down, the final judgment.

To make certain you understand whatyou meant, you take the amount of damages, how much he suffered, how much he is going to suffer; deduct from that

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the amount you say is attributable to his own carelessness, negligence and the difference will be the final judgment.

the matter. During your deliberations you may want to hear some testimony. It may take time to locate it. The reporter punches a lot of holes in some paper tape and it takes him some time to locate it, particularly in a trial that has taken five or six days of testimony. It will take time. If you want to see any of the exhibits, ask for them. You may see any exhibits that are in evidence. You cannot see any exhibits that were marked only for identification and not marked in evidence.

If you want to see all the exhibits, Just say, "All the exhibits." I will not send the film in to you because you have no projector but if you want to see the film, it will be shown in open court.

Make your requests through your foreman,

Juror No. 1, who will be provided pencil and paper.

You can mark these forms of special up, scribble

them up, and then tear them up.

I will only require the foreman to sign a special verdict. I will give the foreman an extra

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copy so you can mark one up or do whatever else you want with it.

Your verdict must be unanimous. Each and every one of you must examine the evidence, discuss the evidence with your associates with a view to arriving at a unanimous verdict. That means it imposes a duty on you not to take arbitrary positions or to abandon your obligation. In other words, it would be wrong for a juror to come into the jury room and say, "I find for the plaintiff," or "I find for the defendant. When you come around to my way of thinking you will have a unanimous verdict."

That is wrong. The jury process is an exchange of ideas. It is one of sifting through the evidence, discussing the evidence. It is equally wrong for a jurgeto come in and say, "I don't want to bother my head about this. You come to a decision and when you do, I will go along with you. Anything you say is all right with me." That is wrong, too.

Each one has a duty to decide the case for himself and herself. Always in constant communication and discussion with their fellow jurors.

Do not tell me how you stand at any particular

time. Lo not tell me you are evenly divided or six to four or seven to three or nine to one. I am interested when you have arrived at a unanimous verdict. All you need do is tell me you have

arrived at a verdict. "The jury has a verdict."

I will call you into the courtroom. I will ask the foreman to stand. I will ask you what your verdict is. Then I will ask Juror No. 2 whether he has heard the verdict of the foreman and whether that is his verdict and I will go down, 3, 4, 5 and right to No. 10. When that verdict is reported in that fashion, it then becomes the verdict of the jury and decides the case. Before that time it is not.

If you would please take leave of the court for a few moments. Do not start deliberations yet. I want to talk to the lawyers once more. Then you can go back to the jury room and talk about the case.

(Jury leaves courtroom.)
(continued next page.)

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THE COURT: Mr. Dorfman, any exceptions to the charge?

MR. DORFMAN: Yes, the exception relates
to the fact that you charged the jury that he lost
no wages having received GAI benefits.

GAI benefits only for the six months to the contract period plus one year, which would only bring him up to, I believe, September of '71. I believe that was misleading to the jury, having received all his GAI benefits, he lost no wages.

That's September of 1970, I'm sorry. So from September of '70, he received no GAI payments and lost wages.

THE COURT: From what period to what period do you say he got GAI?

MR. DORPMAN: He was entitled from the date of the accident, April of 1969 to their contract period which expired September 30, 1969 plus one year.

THE COURT: I think that is the testimony.

MR. DORFMAN: Yes.

THE COURT: Do you agree, Mr. Kain?

MR. KAIN: I about to say, your Honor, the defendant's Exhibit Z in evidence sets forth what years he got it. For example, \$3545.25 and \$2234.00 in 1969.

THE COURT: That's when he got it.

What period is it for?

MR. KAIN: For the duration of 1969 from the calendar year which the New York Shipping Association and the ILA have which is from October 1, as I understand it, through September 30.

I submit to your Honor that perhaps if the

Jury were given the years in which it was paid,

since it goes from '69 to '70 to '71, is the only

way,I think, in the absence of some other record

or some other testimony that we now have available;

I don't see how we can determine how much of it

was earned.

THE COURT: Mr. Terranova made that clear
MR. DORFMAN: It's the six months plus the
year.

THE COURT: I think it's fair to tell them that.

MR. DORFMAN: He received no GAI from September of 1970.

THE COURT: Anything else?

MR. DORFMAN: When you charged the jury as to the defendant's burden on contributory negligence, when referring to the special verdict, you used the plaintiff rather than the defendant.

THE COURT: I did?

MR. DORFMAN: You said if the plaintiff

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failed.

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THE COURT: I do that often. I'm sorry.

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I'll correct that.

Anything else?

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MR. DORFMAN: You did that in one other place. I will try to find it.

THE COURT: You will find when I charge the jury, when they come back, they will shake their head. They will recognize it as you did.

It always happens that way. I sometimes in a criminal case do the same thing. The jury says no, you are wrong, Judge. They say, you mean not guilty. They follow it. That is one way I know they are following the charge.

Anything else?

MR. DORFMAN: That's all I have.

THE COURT: Mr. Kain?

MR. KAIN: Again, I note my objection to your Honor in line with the discussion we had that the shipowner warrants a reasonably safe place to work.

Secondly, I would ask your Honor that in view of the fact that Captain Wheeler was withdrawn

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and the jury was instructed that he had been withdrawn as a witness and his testimony was stricken,

I ask your Honor to point out to the jury that Capt.

Wheeler was withdrawn because it was felt or your

Honor felt, or counsel agreed that his testimony

was not material to the principal action in this

case, rather than for any deficiencies on the part

of Capt. Wheeler.

THE COURT: Anything else?

MR. KAIN: I ask your Honor to charge in substance and in accordance with defendant's Request No. 11 --

THE COURT: I decline to charge in that language.

MR. KAIN: Also, in view of the discussion we have had on the record, I ask your Honor to charge the specific amounts of general, GAI payments made to plaintiff.

THE COURT: May I see that?

isaid document handed to the Court.)

THE COURT: You want me to read all of this (indicating)?

MR. KAIN: I want your Honor, if your Honor is going to charge as to amounts on GAI payments, I submit to your Honor that is the only evidence

44 as to amounts paid to plaintiif.

THE COURT: Tell me what the total is.

MR. KAIN: It's done by year, if your Honor please.

It can be totalled. I didn't total it because I didn't think it was appropriate for me as opposed to the jury.

There were three separate payments.

I submit to your Honor there is no testimony that plaintiff wasn't paid beyond September 30 since this record in evidence shows that he was paid for three years.

THE COURT: You say that he was paid for three years.

MR. KAIN: I say there are amounts recorded in defendant's Exhibit Z as to when they were earned. There is no testimony on the record. There is GAI payments, if I read that correctly, showing a sum for '69, a sum for '70 and a sum for '71.

MR. DORFMAN: Your Honor, I think the testimony was very clear, that he could not pay him

THE COURT: I can always reopen the case if there's any information here that is distorted. That's what I will do.

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MR. KAIN: I don't know if it's distorted.

THE COURT: You certainly know. You investigated this case. You know exactly what he was paid in GAI. I heard Mr. Terranova say that he's paid from the time of injury to September 30, 1969.

Then, for the next year. Unfortunately, I don't have my notes. I have so many notes.

MR, KAIN: That corresponds to my recollection, that both Mr. Terranova and Mr. Clark testified that the year ran from October 1 to the following September 30.

MR. DORFMAN: He's the crucial aspect. They could not make a payment to him because they first had to deduct whatever compensation he had received. They cannot know that until they got the figures from the carrier.

He used the word carrier when he testified. They couldn't have determined that until the yearend. That's why the payment was made the following year in '71. I think if your Honor charges --

THE COURT: Were there any payments made in '69?

MR. DELANEY: Yes, there was. There was a payment.

MR. KAIN: Your Honor is missing the point.

If we are going to be talking about the amount of GAI paid to the plaintiff and if we are going to evolve on those figures, then we're talking about a different figure if we take '69 and '70 as shown on those figures without showing the possible full amount of GAI he got.

THE COURT: I'm not interested particularly in what he got or when he got it. I'm interested in knowing for what period,

Didn't he get it from the period --

MR. KAIN: In terms of at least when it's earned, both Mr. Terranova and Mr. Clark -- maybe counsel will agree -- testified he would get the duration of 1969. That is up to September 30, 1969. That's for that period he would be paid his guaranteed annual wage, that he would then get the full year from October 1, 1969 to September 30, 1970. That's my understanding.

MR. DORFMAN: That's precisely the request to charge.

MR. KAIN: Mr. Terranova and Mr. Clark both testified to this. The point I am trying to make, sir, if we are going to take these figures to this jury, then they should be instructed the only testimony in this record as to the total amount of GAI paid

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to this plaintiff is contained in Defendant Exhibit

THE COURT: I intend to say only to the extent he received GAI wages and to the extent that -- no, GAI wages -- I shouldn't say wages, guaranteed annual income, he suffered no loss and he received guaranteed annual income from April, the date of injury, 1969 to September 30, 1969 and then from October 1, 1969 to September 30, 1970.

I don't intend mentioning amounts.

MR. DELANEY: That's not what the record shows.

It shows he received some more in the next year.

THE COURT: That was the time of payment.

MR. DELANEY: The first payment he received was on December 18, 1969. That isn't in the record. It shows the payment of '69. I called up the individual who keeps the records. She gave me the note. It's written down here, 12/18/69, shows a payment in '69.

MR. KAIN: It doesn't show the exact date.

MR. DELANEY: The exact date it was paid. I know there's a conflict between the testimony and what these records show but Iwould suggest to you that it'e not unique for the New York Shipping Association to have conflicts.

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THE COURT: Certainly, the jury should know that there's nothing in the record to show he's been getting GAI payments for the period from the date of the accident to date.

MR. DELANEY: No.

THE COURT: When did it stop, when do you say it stopped?

MR. DELANEY: 1971, during that calendar year.

THE COURT: You're talking about the time of payment or the period of time?

M.R DELANEY: The same.

MR. KAIN: The time of payment, I understand.

THE COURT: You say he was paid from the period of 1971?

MR. DELANEY: From October 1st 1970 to September 30, 1971 he received a payment of 1700 --\$3162.86.

Your donor, the first possible calendar year in which he could have received the guarantee that's the timony -- is from October 1st, 1968 to September 30, 1969. At the end of the year 1969 he received a payment. That's about two and a half months behind.

THE COURT: That certainly is contributable to the period of September 30.

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MR. DORFMAN: Wait a minute. We don't know that contemplates the previous year's guaranteed annual wage he's entitled to.

THE COURT: There's a dispute of the portion of the payment made in '71. That's whether that's attributable to the year ending 1970, September 30, 1970.

MR. DORFMAN: I don't know why there is doubt. You admit that.

THE COURT: If he's entitled to part of the guaranteed annual wage, wouldn't he be entitled to all of it?

MR. DORFMAN: Why didn't he get \$9000? He didn't get that money.

MR. DELANEY: The witness testified. You get a credit for 2,000 times the pay rate. He also testified you're on compensation. You're credited with so many hours of work. If you do the arithmatic, it comes out to how much you got paid. You don't get paid for 2,000 hours; you get paid for a lot less.

MR. DORFMAN: Precisely the point. When you instruct the jury, that contemplates a reduction. They may think he's getting the full \$8,000.

THE COURT: I've already said that.

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MR. DELANEY: I don't think your Honor should mention how much he actually received at all. I think you already charged properly on the point. Let them look at the record. We have all commented on it, on summation.

THE COURT: I'm certainly going to charge them to the extent he received a guaranteed annual income, he suffered no loss of wages.

I don't think it should remain there.

MR. KAIN: This I submit is a matter of record, the amounts paid.

THE COURT: That's a very confusing record.

MR. KAIN: I didn't prepare it.

MR. DELANEY: Concedingly so.

MR. DORFMAN: What better testimony can we have, when they refer to the contract and the contract delineates the time period. If there is a payment made and that is explained --

THE COURT: There seems to be some proof or something in the record that indicates that he was paid for the contract year ending September 30, 1971.

MR. DELANEY: He got the money, declared on the income tax.

THE COURT: That may be the time of payment.

MR. DORFMAN: Exactly.

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Obviously, that was so definite by virtue of the testimony.

MR. KAIN: If your Monor please, the inference is possible that I don't think it's testified to in the record, but I submit to your Monor, that the GAI, as I understood it did not go into effect in 1969, ab initio.

This witness, prior to this time, did not, according to these records, get GAI payments.

I submit to your Honor that it possibly didn't work that much. That's part of the decasualization problem he had with the Waterfront Commission. I think he qualified for this, in part, at least, by the forty hours per week that he was allowed while he was disabled from this particular injury and I submit to your Honor this may be the explanation as to why part of it wentover to 1971. I don't think it's material to this injury as long as they are told it is a matter of record.

MR.DELANEY: The record hould speak for itself.

THE COURT: If it's confusing, it's my job to tell them about this. It's too important a matter. They may be left with the impression he's getting his money to date.

'73.

MR. DORFMAN: If I may, I don't think there's any dispute the contract period that --

MR. KAIN: It shows no payments in '72 or

THE COURT: I'm surprised there is this kind of dispute at all.

MR. DELANEY: Judge, there's about \$40,000,000 in claims between the New York Shipping Association and its members because no one knows how much tonnage was brought in this port since 1968 since this GAI and other benefits.

No body can prove it. They guess at it.

THE COURT: But the time to which he's entitled to GAI, how can that be in dispute? How can he get part of GAI?

MR. DELANEY: He might have gotten it after the period.

THE COURT: You're talking about when he received it. I'm not interested. They're paying him now for the past, the time of payments is meaningless. It's whether he got paid for any period. That's what's important.

MR. DORFMAN: Mr. Kain admitted to your Honor a short while ago the contract period is what he indicated.

MR. KAIN: If your Honor please, this is the uncontroverted testimony, but that doesn't mean that the pay records of the amounts -- if your Honor is going to charge amounts --

THE COURT: I am not going to charge amounts.

What I wanted to charge is he's not entitled to any
reimbursement for the hear 1969, April 3rd, 1969 to
September 30, 1969, from October 1, 1969 to
September 1970 because he got GAI, except only for
that amount that he would have to pay back to the
compensation carrier.

That seems to be a fair way to put it.

MR. DORFMAN: All right.

MR. KAIN: I have no objection as long as your Honor doesn't indicate to this jury the amount shown on this particular record is the only amount in GAI.

THE COURT: What objection do you have to that before I charge it?

MR. KAIN: Your Honor should tell them that this is a matter of record, so that they can, if they wish to proceed, go ahead.

THE COURT: Then it looks like a second summation.

MR. DELANEY: I would agree to that statement.

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THE COURT: All right.

Anything else beyond Capt. Wheeler's testimony and striking it, Mr. Kain?

We are still on your exceptions. You have Capt. Wheeler's testimony. Do you want me to comment on that? Mr. Delaney?

MR. DELANEY: I know your Honor charged mitigation. Your Honor covered that it wasn't very strongly put that if he can return to some gainful employment, he's obligated to try to.

THE COURT: I try to use something of what we used in Social Security disability claims.

I can tell you that if I start that hen I have to go to what his education was, what he's capable of and the limitations imposed and how the limitations prevent him from competing fairly which is a term that's very important and Judge Friendly has stated it a number of times, we're not talking about theory here.

I can tell you that if he had a bad back and you were perfectly normal and both the same age and both the same capabilities and you went to one employer who knew that he had a bad back and it might be injured easily, I wouldn't employ him in that employment. Bending down, even tying the

shoelaces in a shoe store. I would have to go into a lot deeper. I wouldn't leave it that way.

MR. KAIN: I have no objection to what you will say about Capt. Wheeler.

THE COURT: That's one of the problems. We talk about mitigation, reasonably fit. It all rises out of the extent of his injury, whether he's really hurt that much.

If he's hurt to the extent that everytime

he sneezes he's going to become disabled, forget it.

I don't care what his job is, hairdresser --

MR. DELAN EY: I didn't understand the hairdresser.

THE COURT: -- or checker, there was one other, the chauffuer. We have to not only think of the limitations of disability but hwat his position is in competition with other jobs, the availability.

Now, we can bring in a lot of collateral matters, statistics, employment, the particular trade.

We open up Pandora's Box. Sometimes trying to make it a little more definite creates so many problems it becomes confusing. Sometimes the blunt edge is a lot more helpful than the fine scalpel.

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MR. KAIN: Would your Honor make it clear to this jury that it is not conceded that the plaintiff required retraining?

In other words, alternative. We are not conceding.

THE COURT: I won't go into that, no, sir. I'm sorry. Anything further?

MR. DORFMAN: The plaintiff does not assume a risk of seaworthiness of the vessel rather than unseaworthiness of the vessel. The plaintiff has no further requests.

THE COURT: All right. Anything further/

MR. KAIN: No.

MR. DELANEY: No.

MR. DORFMAN: No.

THE COURT: Seat the jury.

(Jury enters courtroom.)

THE COURT: I very often transpose ideas while I am speaking with you. I mean to say plaintiff and I say defendant. When I say defendant I mean plaintiff. I mean to say unseaworthiness and I say seaworthiness. That's what most of the corrections to my charge were referred to.

I have been told I said that the plaintiff does not assume the risk of seaworthiness. He

does not assume the risk of unseaworthiness, obviously.

Again, I was told that when I intended to say that the defendant has the burden of proving that the plaintiff was negligent and that that negligence contributed to the happening of the accident, to the injuries, I said the plaintiff has the burden. I do not know whether you recognized it as I said it. I see a smile on some of the jurors. I assume you had picked it up and you caught that error.

Obviously, the defendant is the one that says the plaintiff was contributorally negligent. The defendant must prove that by a fair preponderance of the credible testimony.

enough when I said that the plaintiff cannot recofer loss of wages to the extent that he received his guaranteed annual income and that is for an obvious reason. He received it once in the form of guaranteed annual income. That was for the period from the date of injury, April 3rd, 1969 to the end of that contract year, September 30, 1969 and from the period October 1, 1969 to September 30, 1970.

There is another exception to that, except

that, of course, he is entitled to recover that portion which he would have to give back for that period. He is getting about \$50.00 a week, if you recall. Your recollection again, is what counts, not my recollection.

If you will recall, for a brief period,

Capt. Wheeler was on the stand and then you left

the courtroom and then Capt. Wheeler was withdrawn.

His testimony was stricken. That, in no way is

intended to convey the idea to you that Capt.

Wheeler is unbelievable or there was anything wrong
in appearing. I just found as a matter of law that

at that time what he was going to testify to should

not be before the jury. That's all.

Both counsel agreed to that and that the should be withdrawn. With htat, I will ask the Clerk to swear in the Marshal.

(Whereupon, Ronald Ehnes, a United States
Marshal, was duly sworn by the Clerk of the Court.)

THE COURT: Your lunch will be arriving at about 12:30. When your lunch arrives, I am going to excuse the lawyers because that will give them an opportunity to have something to eat. During that period, any communication you send to the Court will not be answered because I do not do anything on my own.

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I am not allowed to. It would not be right. When I get a communication from you, I take it up with the lawyers. They will be out to lunch.

If you get no answer during that period, do not think I intend to be disrespectful. It is because I cannot do anything about it. You are excused for the deliberation of the matter before you.

I am confident you will decide this case fairly which means treat the parties fairly. Decide the case solely on the evidence, soely on what you heard in this courtroom, free of all bias, prejudice and sympathy. If you do that, neither party can complain about the result.

The jury is excused.

(Jury leaves courtroom.)

THE COURT: Do all the lawyers intend to remain in the courtroom or wait -- do you have any other place you would like to go to.

MR. KAIN: No, except for luncheon break which you referred to.

THE COURT: As soon as I see the food coming in.

MR. KAIN: May I ask your Honor, would your Honor direct that all the exhibits be collected

60 together?

THE COURT: Good idea. I appreciate it if
you put them on the Clerk's bench and both sides
look at the exhib its to make certain they are the
exhibits marked in evidence.

They may be turned over to the jury if they request it.

MR. DELANEY: Your Honor, on the third-party case, if Capt. Wheeler's testimony is the only thing that remains, I wonder if maybe we could deal with that --

THE COURT: I hope to do it today. I suggested when you weren't here -- I suggested it to Mr. Kain.

MR. KAIN: I could have Mr. Wheeler in this courthouse at 2:00 o'clock waiting for the jury.

MR. DELANEY: I would like to press my objection to Capt. Wheeler's testimony on a different ground. He intended, as I understand it, to testify to custom and practice.

THE COURT: Yes.

MR. DELANEY: In the context of which he was going to testify, was that, apparently, lashers always carry grease buckets and these men were lashers, therefore, we can draw the inference that

that's where the grease came from, or might have come from those buckets.

I submit that he can't testify as to that custom and practice. It's the kind of custom and practice—an expert has to testify to a standard of care. That's not what he's trying to do.

There's New York cases, one involving a maritime case. I have the case here. I haven't finished reading it.

It goes in rather thoroughly, I think, on what you can and can't testify to. It mentions the usual situation where you give an expert the facts. He gives his opinion, but he can't decide by his testimony what the jury has to decide and I think he also can't essentially testify as a fact expert.

The can testify about fact, background material in cases where that's necessary to explain something. You don't need his testimony that lashers carry grease buckets for this jury to draw any conclusion from because there's no basis upon which he can testify.

I think his testimony in that regard is totally improper. It should be excluded.

THE COURT: How about the failure of counters to come into the case and present evidence.

MR. DELANEY. Excuse me.

grease buckets?

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THE COURT: Did you conduct a deposition to determine, Mr. Kain, whether they had any

MR. KAIN: I don't believe I asked the question of this plaintiff because the only testimony I took --

THE COURT: I'm talking about C.C..

MR. DELANEY: No, he didn't.

MR. KAIN: May I say first of all, I disagree with what Mr. Delaney says. He's making the assumption the sole function of Cart. Theeler is to testify that, that in their day-to-day operations in lashing that carpenters carry grease pots. I think that's valid testimony.

To my knowledge, lashers routinely have to use grease pots. I don't want to lay out this issue of the questionof safety and regulations for longshoring. We also have direct evidence that the saw which is used here, the type of saw it is and I submit to your Honor this saw is lubricated.

You cannot run a chain saw through green lumber without lubricating the saw.

THE COURT: With grease?

MR. KAIN: Lubricated by oil ..

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MR. KAIN: Isn't that a standard in the

MR. DELAMEY: By oil. That's why the questions were asked to the witness, the difference between grease and oil. I run a chain saw, too.

It's oil.

MR. KAIN: The testimony, at least to the Chief Officer, this appeared to be grease with matter. There's nobody testifying he picked this up and looked at it. I submit to your Honor that the combination of saw dust and oil and grease -- I have no way of identifying it. I have no way of knowing. I wasn't there. Mr. Delaney wasn't there.

I submit, your Honor, we are not talking about this custom and practice of grease spots. I think it's inappropriate, your Honor, before Capt. Wheeler gets here to in effect rule in advance.

THE COURT: On this particular bit of evidence, why can't I rule on that?

MR.KAIN: On what, sir?

that it's the custom and practice to have the lashers have grease pots. Mr. Delaney says it's inadmissible because the only purpose of admitting evidence of custome and practice is to establish standards in the industry. That's the usual purpose.

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industry, that it's necessary to grease lashings and shackles?

THE COURT: No, but the issue, what you're saying is that you're trying to prove they complied with the standard by bringing greese on but doing it for different purpose, trying to prove they are the ones that brought the grease on, not to establish a standard but to try to prove they violated their warranty.

MR. DORFMAN: I have to leave. Mr. Fodera will stay here.

THE COURT: He's authorized to take the verdict?

MR. DORFMAN: Yes.

Happy New Year, your Honor.

THE COURT: Same to you, Mr. Dorfman.

You say you have a case on it?

AR. DELANEY: Sixth Appellate Division, 2nd,

544.

THE COURT: What's the name?

MR. DELANEY: Clark v. Land Steamship Company.

There's a good summary in there of the opinion of it, custom and practice.

THE COURT: I'll see what I can find. You can look at it in the meantime. If it comes to that,

it's a serious question. I might very well wait for the jury verdict. No sense in going through all this to find that there is no issue.

There is a possibility here that the verdict would be adverse to the plaintiff. That's possible.

MR. DELANEY: Your Monor, I think your Honor sees my point, he's trying to establish the existence of a fact. That's not the usual way, if you use the standard of care.

THE COURT: He's not using it to establish the standard. He's using it to establish the breach.

MR. DELANEY: The breach , right; correct.
That's totally improper.

THE COURT: I'll have to think about it.

It was never presented this way. One of the shorthand research methods I use is to use a proposed
rules of evidence. That has this type of topic
annotated pretty well. That I have done a good
job there.

If I find a quick answer, I'll let you know.

I'll read the case, too.

I assume we will be able to contact the lawyers.

(Time noted: 12:00 o'clock p.m.)

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(Time noted: 2:00 o'clock p.m.)

THE COURT: The jury has reached a verdict.

Please mark this.

THE CLERK: So marked as Court's Exhibit 5 for identification.

(Jury enters courtroom.)

THE COURT: I have the jury's note that the jury reached a verdict.

Madam Foreman, please stand.

(Foreman complies.)

THE COURT: In answer to the first question: Did the defendant breach its warranty of seaworthiness; how did the jury answer that?

THE FOREMAN: Yes.

THE COURT: Did the breach of warranty proximately cause injury to the plaintiff?

THE FOREMAN: Yes, your Honor.

THE COURT: The amount of plaintiff's

damages?

THE FOREMAN: \$80,000.

THE COURT: Was plaintiff contributorily

negligent?

THE FOREMAN: No.

THE COURT: You find plaintiff is entitled to judgment against the defendant in the sum of

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210 \$80,000? 67 2 THE FOREMAN: Yes, sir. 3 THE COURT: Have you signed your copy of the 4 verdict? 5 THE FOREMAN: Yes. 6 THE COURT: Please show it to me. 7 (Document handed to the Court by the Marshal.) 8 THE COURT: Juror No. 2, you have heard the verdict as given by the Foreman. 10 Is that your verdict? 11 JUROR No. 2: Yes. 12 THE COURT: No, 3, is that your verdict? 13 JUROR No. 3: Yes, your Monor. 14 THE COURT: Juror No. 4, is that your verdict? 15 JUROR No. 4: Yes, sir. 16 THE COURT: No. 5, is that your verdict? 17 JUROR No. 5: Yes, sir. THE COURT: No. 6, is that your verdict? 18 19 JUROR No. 6: Yes, your Honor. THE COURT: Juror No. 7, is that your verdict? 20 JUROR No. 7: Yes, sir. 21 THE COURT: Juror No. 8, is that your verdict? 22 JUROR No. 8: Yes, sir. 23

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JUROR No. 9: Yes, sir.

THE COURT: Juror No. 9, is that your verdict?

verdict?

THE COURT: Juror No. 10, is that your

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JUROR No. 10: Yes, your Honor.

THE COURT: So say you all?

(Jury responds yes.)

THE COURT: Is there any motion that anyone wants to make directed to the jury before I discharge the jury?

MR. DELANEY: No.

MR. KAIN: No.

THE COURT: I think this case completes your jury service. With most of you, as I recall it, it's the first time you ever served on a jury.

Of course, with all of you, it's the first time you ever served in the Federal Court.

You may have heard a lot of complaints by jurors about how frequently they must serve and what a burden it is and how they would like to get out of jury service and so forth.

well, the picture has changed, particularly in the Federal Court. We have such a large number on what we call our master jury wheel that it would indeed be a rare occurrence if you were called back to serve again in your lifetime.

We have about five of six hundred thousand

and that number is being increased every year.

Ultimately, every -- well, not ultimately now, but

everyone who votes is a potential juror.

From that, we select the numbers and it goes into a Master Jury wheel. This, to me, is a rare experience for you. I we that you learned something about our judicial system and I think knowing something about it will demand some respect for litigation in our court and our judicial system in general.

I know it's been attacked vigorously, from various sides by some who know something about it and by many who know nothing about it. You have served this time during this month on this case, and it will give you some insight into what the problems are and how the cases are tried.

Thank you for your service. Just report downstairs. I am sure you wil' be discharged there and have a happy holiday.

THE FOREMAN: Thank you, your Honor.

(Jury leaves courtroom.)

THE COURT: The Clerk is directed to file the verdict and to withhold the entry of judgment until I hear the rest of the case in the claim of Concord Line v. C.C. Lumber, Inc..

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Is Captain Wheeler here?

MR. KAIN: Yes, he is.

THE COURT: Are you ready to proceed?

MR. KAIN: May I have about two or three

minutes?

THE COURT: Sure.

Tell me when you are ready.

(Recess taken.)

THE COURT: I have done some brief reading onthe question that you raised, Mr. Delaney.

I don't know what the answer to it is, at this point. I know what you are talking about. I think that we have a case that tries to distinguish personal habit that might establish an event and custom and practice in a business or profession. I'm going to take it. If I find that it doesn't apply, then I'll just disregard it.

The ose that you referred to was just submitted to me. Where do you say this case holds you can't offer testimony?

MR. DELANEY: I don't say it says that, your Honor. Page 547, they review two separate cases in which expert testimony is usually given.

T think we are accustomed to the second instance they give where the facts are given to an

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71 expert. He gives conclusion in the form of an opinion which is not the case here.

is the objection to expert testimony where the expert gives an opinion as to the ultimate fact normally to be determined by the fact finder.

MR. DELANEY: That's partly it.

THE COURT: Well, I can tell you that that principal has been whittled away. That's subject to discussion in the proposed rules of evidence and I know what you mean. If I bring a police officer to the stand and say, "In your opinion, was the driver negligent? Can you tell us how fast he was going?" The first answer is no. The second answer is yes.

MR. DELANEY: The second question is proper.

The case they cite, Dougherty v. Milliken, is where -
THE COURT: 163 New York 527.

MR. DELANEY: An expert testified as to whether a bolt used was strong enough. They said he could testify to the fact.

THE COURT: I understand your argument, now.

MR. DELANEY: There's a second part. That's more important here. He intends, as I understand it, to testify, to custom and practice to sort of work

72 his way backwards here.

He doesn't have the fact upon which to give his opinion. He's going by custom and practice establish the fact. How can he do that? I don't understand. How is an expert allowed to do that? If this was a case of electronic gear or something and no ordinary person would understand it, I can see where an expert could testify factually as to what was here, how it worked, what it should or shouldn't do. We are talking about things within our province.

THE COURT: Forgive me for the little humor, but when you said how can he do that. He can't do that. There was some comedy show on television where whatever happened, one comedian turned to the other and says, "Can he do that?" "He can't do that?"

Well, it actually happened, you are saying he can't do that.

MR. DELANEY: He shouldn't be allowed to.

THE COURT: That's reverse reasoning where the conclusion is there and you try to take steps down to find out how it happened.

Then you learn or somehow reason that it didn't happen when you know damn well it did happen.

I'm a little confusing, too, I know. What I

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am saying is that I'll take it. I think I know what you're saying. I thought you phrased it a little better before when you advised an expert can testify as to custom and practice in a trade, to establish what the standard is.

MR. DELANEY: That's right.

THE COURT: Here, the expert is not offering it for that purpose. He's offering to prove a violation, a breach.

MR. DELANEY: He's being offered to testify to the fact which would show the breach.

THE COURT: Yes.

MR. DELANEY: I don't think he can do that.

THE COURT: That, I don't know.

MR. DELANEY: You see, custom and practice is not the ordinary way custom and practice is given.

THE COURT: You would agree that if Capt.

Wheeler were familiar with the custom and practice

of the C.C. Lumber Co., Inc., if he knew that

every day they took a grease pot out when they

did lashing and he could testify to that, that he

knew what the custom and practice was, I don't

suppose you'd argue about that. You'd say, "well,

that is a matter of habit of this individual."

If they've done that over a period of years

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74 and done it every time they went out lashing, the jury from that can infer they did it this time.

Can you attribute to an individual a practice that is carried on by a trade in order to prove a violation of the obligation, to prove the breach? At this point, I don't know. You may be right. It was never posed to me that way.

I would rather not express an opinion. For expedience, I would like to take it and then if I don't think it's relevant, I'll say so if I write on it.

If I do think it's relevant, I'll say so.

I just don't have the means to make any intelligent determination at this time. Suppose you call Captain Wheeler.

It may be that evidence separate and apart from that may establish the fact.

MR. KAIN: Captain Wheeler. (continued next page.)

WILLIAM WHEELER, called

as a witness herein, having been first duly sworn by the Clerk of the Court, was examined and testified as follows:

DIRECT EXAMINATION

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BY MR. KAIN:

MR. KAIN: If your Honor please, before I proceed with this witness, may I ask your Honor to take judicial notice of the following provisions of the Safety and Health Regulations for longshoring, 1504.2, subdivision A.

THE COURT: I don't have it. I returned it to Mr. Podera. You will have to give me a copy and remark yours.

> I'll take Mr. Fodera's copy back. (Said copy handed to the Court.) MR. KAIN: 1504.3, subdivisions A and C and

And 1504.91, subdivision C.

May I also refer your Honor to Defendant's Exhibit S in evidence marked in the original trial which is the Coreman's daily report from April 3, 1969.

THE COURT: May I see it.

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(Said document handed to the Court.)

THE COURT: What do you say this adds to this particular issue?

MR. KAIN: A description, documentary proof of the work in which the carpenter gang and lashers were engaged on April 3, 1969. And it's a record made in the course of Court Carpenter's business. That's my contention, which effectively sets forth the work engaged.

It also lists, if your Honor please, the men working in the two catagories of lasher and carpenter plus the services of a saw man, your Honor, that's charged on an hourly basis.

THE COURT: I don't think any of that was in dispute. The only thing that is in dispute is the lashings before the accident. There's enough evidence here to show the lashings were there, at least some of them, before the accident.

I don't know that that adds anything. It probably corroborates.

MR. KAIN: I wanted to reemphasize.

DIRECT EXAMINATION

BY MR. KAIN:

- Q What is your present employment?
- A Presently self-employed, marine surveying and

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consultant.

Q Would you tell his Monor your marine background, qualifications for your work as a marine consultant?

A Graduated highschool, 1935.

I went to sea as an ordinary seaman, 1939.

I was enrolled in the Maritime Commission's Cadet Training

Program, graduated from that course of training in 1941,

with a Third Officer's license.

I said as Third Officer for about a year and a half. That qualified me to sit for Second Officer's examination. Passed the examination. Sailed as second Officer for about a year. That qualified me to sit for my Chief Officer's examination.

I passed that, sailed as Chief Officer for about 18 months. That qualified me to sit for Master's license. Finally in 1945, I qualified as Master, unlimited. No limits on tonnage or waters.

I sailed as Master from 1945until 1948 when
I reverted back to Chief Mate.

THE COURT: All on cargo ships?

THE WITNESS: And passenger ships, also.

Reverted back to Chief Mate in '48. I was called back to active duty in '50-'51 during Korea, the Navy. In '52, I came back as Chief Officer on

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78 Merchant ships, passenger, accommodation cargo ships.

The end of '52, I went ahore and worked as a stevedoring superintondent until 1955 when I went back to sea as Master on a cargo ship.

Six months later I came ashore and I worked, came into my present activity as a marine surveyor.

THE COURT: Who did you work for when you worked as superintendent?

THE WITNESS: John W. McGrath, who did their own carpentry and lashing work.

BY MR. KAIN:

- Q Did you, Captain in the course of your employment as a stevedore-superintendent have occasion to work with and supervise the work of carpenters and lashing gangs?
 - A Yes, sir, I did.
- Q Did you also, Captain, in the course of your sea experience as a Chief Officer have occasion to work on ships where carpenters and lashers shored and boxed cargo?
 - A Yes, I did.
- Will you tell me, Captain, based on your experience as a stevedore superintendent and a ship's officer. is grease a necessary produce in lashing work?

MR. DELANEY: Your Honor, I would like to object to this question being too broad. If he

BY MR.

restricts his experience to the port of New York,
maybe --

I would like to know whether the Captain is qualified to express an opinion as to the customs and practices in the Port of New York and more precisely on the Brooklyn piers concerning lashing, stowage of cargo.

Q Yow, would you tell me, Captain, where did you do your work as a stevedore- superintendent?

Initially, I was on the East River, Manhattan side, then I went to Brooklyn very briefly and in the Bush Terminal area, Pier 2 and Pier 5. I'm trying to think of the name, the MORTON LILLY was there for a while.

THE COURT: Are the practices in Brooklyn pretty much the same as New York.

THE WITNESS: Regarding lashings?

THE COURT: Yes, sir.

THE WITNESS: Yes, sir.

Just about the same.

THE COURT: Is it general throughout the country?

THE WITNESS: Just about the world, throughout the same, lashing of deck cargo on ocean-going vessels.

Q Did the ships on which you were a cardinal officer, Chief Officer, did many of those ships call in the Port of New York as the terminal end of one of their runs?

A Yes, sir, they did.

Q Captain, based on your experience, both
as a stevedore-superintendent and as a ship's officer, is
grease necessary in lashing work, the use of grease?

A Yes, sir. The application of grease is necessary on threaded elements of the lashing compnents.

Q What are the threaded elements that you refer

to?

A The wire rope clips, It's a U-clip, U-shaped bolt with a saddle that fits over it. The end of the re rods are threaded, that requires lubricants to work easily and efficiently.

The turnbuckles themselves, the takeup components are threaded rods, requires lubrication.

The screw pin shackles, the pins of the shackles that have threads that require lubrication.

Q Could you tell me, Captain, based on your experience both as a superintendent, stevedore-superintendent, as a ship's owner, why is it necessary that these lashing components you refer to have to be greased?

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Wheeler - direct

So that they can be taken up when the ship A is out to sea for a few days, when everything shakes down a little bit, due to the working of the ship. The lashing is done in such a way that the turnbuckles are made up and to leave some additional take up, so that after the

cargo settles down a bit, it can be further tightened or

tightened more.

After two or three days, four days, sometimes a week later, depending on the type of weather you experience, that you'll find that you can take up on the lashings, the tightening.

This is why you need the lubricants on there to preserve the working ability of the threaded rods. Salt water would seize them up in a few days, if not hours.

THE COURT: Why grease and not oil?

THE WITNESS: Oil would be washed off with sea water. Grease is more adheasive. It's really sticking into the thread and even in a normal atmosphere, some of the vehicle, the oil that's in the grease will dissipate, evaporate. It will leave a more solid substance there which won't wash off so readily due to the sea water coming aboard if that occurs.

> Is there a custom and practice as THE COURT:

to how the grease is applied; liberally, is it applied on the outside as well as the inside?

THE WITNESS: It's applied to the threaded rod, usually, the male portion and as you insert it into the female thread, it will lubricate that, too. It's applied -- it's not applied too excessively. It should not be applied excessively, enough to serve the purpose.

You can see it if you look at it.

BY MR. KAIN:

Q Other than these components of the shackles, turnbuckles and the clips that you referred to, was there any other lubrication used on any components of lashings?

A The lashing wire, the wire rope, is lubricated.

This is usually a heavy oil to slush down the wire rope.

Q Captain, I show you these three pictures,
Defendant's Exhibit A, A-1 and A-2 in evidence.

Were you present when those pictures were taken?

- A Yes, sir, I was.
 - Q Do you remember where they were taken?
 - A In your office.
- Q Captain, have you inthe course of your work as a stevedore-superintendent and as a ship's officer had

occasion to work with and supervise carpenter gangs using

saws of that type?

A Yes, sir, I have.

Q Have you, yourself, in the course of your work had occasion to yourself use saws of this type?

A Yes, gir, I have.

Q Will you assume with me, Captain, that the saw as depicted in that photograph is the general type of saw used on April 3, 1969 in cutting both dimensional lumber and donnage abord the M.S. JILL CORD?

Would you tell me, Captain, what if any lubricantion is necessary in using that saw?

apparatus around which the chain is drawn — the chain runs in a very smal groove on the edge of that bar. It's imperative that that surface, that metal to metal sur ace between the chain and the bar be lubricated and any light motor oil, No. 10, S.A.E., similar to what you put in your automobile, is deposited in this reservoir buil into the frame of the saw.

Each, maybe, every third piece you cut, every third piece of two by four that you cut, you press that plunger, depress the plunger. That squirts -- puts a small squirt of oil onto the blade. This blade continuously

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runs around. That surface has to be lubricated. Otherwise, the chain, the components, the link of the chain will get overheated. The chain will fail and break.

Would you tell me, Captain, based on your experience what if any effect, including residue, do you get from cutting green lumber, that is green dunnage with that type of saw using that type of lubrication?

> MR. DELANEY: I'm going to object, because there's no testimony here that this dunnage on this ship was green.

MR. KAIN: I submit plaintiff has testified it was green.

THE COURT: I remember the question.

MR. KAIN: I specifically asked the question and got an affirmative answer.

MR DELANEY: You asked him if dunnage is customarily green.

THE COURT: Overruled. I'll allow it.

THE WITNESS: Dunnage is uncured or undried lumber, fresh cut from the sawmill. It's hardwood, oak, etcetera. It has a high moisture content, sap from the tree. When the combination of oil from the saw, the sawdust and the sap from the fresh lumber, it makes a deposit, a coagulation that sticks BY MR.

Wheeler - direct

to this, inside the housing, this shield plate here.
If you notice the housing of the saw motor is faired,
the fairing here, so that as the blade goes
round, the deposits in this area, and buildup and
periodically, a lump of this material; oil, sawdust
and sap from the tree will be ejected from the saw.
KAIN:

A Do you get a similar effect, Captain, from sawing air-dried lumber with this --

A You get similar to a degree but you don't have very much of the sap and it usually will be ejected in smaller amounts. It won't build up inside the housing. It's gooey and sticky due to the sap from the green lumber.

MR.KAUAS I have no further questions.
CROSS-EXAMINATION

BY MR. DELANEY:

Q Captain, so it's clear, you worked ashore for McGrath for about three years?

A That's about right, from '52 to the end of '54.

Q Out of those three years, how much time did you spend in Brooklyn?

A Most of my time was up on the North River.

I'd say about three, four, five months in Brooklym, overall.

As well as Port Newark. I worked in Port

Newark for a short period of time, too.

Q Right.

During this period in Brooklyn, three or four months you say?

- A That's right, as a superintendent-stevedore.
- Q Your job was to cover all the stevedore operations conducted by John McGrath?
- A No, I covered the one I was assigned to, at any one time.
 - Q Did you cover one ship at a time?
- A No, One terminal at a time. I was pier superintendent. Sometimes we would work morn than one ship at a given terminal.
- Q So that you were at one of the piers in Bush Terminal. You would be in charge of McGrath's at this entire pier?
 - A That's right.
- Q McGratHs customarily hired its own lashers.

 They work for John McGrath; is that right?
 - A That's right.
- Q It's not so today but it was the custom for many years?

87 Wheeler - cross
A As far as I know it's still today. No, you're
right. Recently they formed a subsidiary of McGrath.
Before ti was s department now it's a subsidiary.
Q Right.
The same carpenters work for them all the
time, most of the time?
A The nucleus of their carpentry force, yes.

Q Are you saying that the custom and practice that McGrath stevedores did at Bush Terminal is what is generally done in the whole Port of New York?

A No, I didn't mean to infer that. What I did and what I observed, how I carried out my detail, when I was superintendent, is consistent with what I've seen down through the years as a marine surveyor, periodically getting aroung to ail parts of the Port of New York.

THE COURT: Do you know C.C. Lumber, Inc.?
THE WITNESS: Yes.

THE COURT: Have you seen them work aboard ship?

THE WITNESS: I have.

THE COURT: Did you see their lashers work aboard ship?

THE WITNESS: On occasion, I've been on ships that they were doing the work on and involved deck

cargo.

THE COURT: On how many occasions, five, ten?

THE WITNESS: Oh, no. I would say in the

area of 100.

THE COURT: Doing lashing --

THE WITNESS: I would -- I didn't take particular note to count.

THE COURT: Chocking?

THE WITNESS: Chocking, lashing, desk cargo has to be both; lashed and chocked.

THE COURT: Did you see them with any pot of grease?

THE WITNESS: I didn't take particular note.

I saw grease properly applied to deck lashings

on ships that I was aboard. At one time, there, '57,

'58, '59, I was covering sixty-six ships a month.

THE COURT: How long has C. C. been in business, as far as you know?

THE WITNESS: Back to the beginning of my time, I would say at least into the thirties, early forties.

THE COURT: Employees of C.C. worked for you at any time?

THE WITNESS: No, sir, not directly. I don't

1	89 Wheeler - cross	
2	recall them ever being aboard a ship that I was on,	
3	that I was in.	
4	Q That you were the Captain of?	
5	A That's right.	
6	Q Going back a few years, there were many	
7	carpenter lashing companies in the Port of New York?	
8	A Not too many. Offhand I can recall, Quinn	
9	Lumber, Hamilton Lumber, McGrath. Their own department.	
10	That's about it. There's not too many.	
11	Q I think his Honor asked can you lubricate	
12	those same fittings that you were talking about that you	
13	said you had to use grease, can you lubricate them with o	il
14	A You could but it wouldn't stay on. The hea	ıvy
15	rain or sea coming over would wash it right off.	
16	Q The fact is that you can lubricate with oil	.?
17	A You can. Anything is possible.	
18	Q Were you sitting inthe courtroom when you	
19	heard Mr. Nielsen testify that they used oil on their	
20	running gear?	
21	A When I heard Mr. who?	
22	Q Nielsen, the Chief Officer, testify.	
23	A Yes.	
24	Q That they used oil on the running gear.	
25	MR. KAIN: May Ihave a definition of running	19

gear?

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Wheeler - cross

MR. DELANEY: The wire falls.

THE COURT: The contraption outlined --

Cargo runners?

Yes, a heavier -- not a light motor oil, but a heavier waste oil from the engine room.

He said they used a waste oil. He didn't characterize it as heavy.

The waste oil from the engine would be a mixture of the lube oil fuel oil thrown into it.

In any event, that's the custom on his ship?

> A Right.

Isn't it the custom on American ships to use grease to lubricate what they call the slush, running qear?

No. Sometimes you can put it on with a rag. Sometimes a brush is used. You grease it right on the drum or oil it on the drum of the winch, it's applied with a paint brush.

This same running gear sits on the winch or boom. When you're out at sea and the rain is on it, the sea is on it, just like the lashing?

And it washes off and you have to put it back on.

A 234

1	Wheeler - cross
2	Q It's been 18 years since you stopped going
3	to sea actively; isthat right?
4	A That's right, 1955.
5	O During this time, you've been in business as
6	a consultant, is that right?
7	A Marine surveyor and consultant.
8	What percentage of your business do you do
9	now as a marine surveyor?
10	A Yow?
11	Q Yes.
12	A The last two, three, four years. I would say
13	about 75 percent is reviewing details that come in.
14	Q F or potential litigation?
15	A Yes, I review some of the file material,
16	reports, documents.
17	Q You do a great deal of testifying?
18	A I won't say a great deal. I will say one out
19	of evern ten cases that reaches the Court. One out of every
20	ten I review might reach the Court.
21	Q Captain, are you saying that all donnage is
22	so green that there's still sap in it?
23	A All commercial dunnage supplied by the usual
24	dealers in the product to be used for marine purposes is
25	green lumber, the slashings, from the mill. Some of it still

has the bark on it. It is green. It is never air-dried,

Wheeler - cross

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- Q If it's dried, there's no
- A There's always some. Kiln dried lumber is about 14 percent moisture.
- Q If you took this piece of lumber here, there would be moisture?
 - A There would be moisture.
- Q In dunnage supplied to a ship, say in the Port of New York, might it be carried to some other port and back again and out again and back again a number of times and still beused; isthat right?
- A That's right. Then it would be air-dried to some degree.
- Q Right. It's your opinion here -- are you saying -- do you have any knowledge the dunnage used on the JILL CORD on the day of the accident was fresh lumber or old dunnage?
 - A I don't have my such knowledge.
 - Q Did you ever cut down a green tree yourself?
 - A Yes.
 - Q Oak?
 - A Not oak.
 - Q Or --
 - A Elm.

Wheeler - cross

Q If you cut down an oak or ash tree with a power saw, using this lubricating device, does it always accumulate debris?

A It leaves this gummy deposit on the inside of this shield plate. There's a little area in here.

You can see the housing (indicating) is faired off here.

This plate, inside here, the chain runs in between that plate and the housing.

There's quite a little space in there. This is where the deposit builds up. When it reaches a critical mass, then its ejected from the chain itself.

Are you saying that this debris that accumulates there, fell on the deck --

A I say it would be ejected.

Q Let's say it fell on the dekc and somebody stepped on it. Would that look like a spot of grease?

A It would have a greasy appearance. It would have solid matter, sawdust in it.

O It would be oil on sawdust?

A It would have a greasy appearance, composed of oil, sawdust and this sap from the tree, the resins or whatever it is you call it.

Q In your experience, you know the difference between grease and oil?

A Yes.

	A 237
1	94 Wheeler - cross
2	Q Grease has a consistency. If you pick it up
3	it would make a glob, stick up in the sir or stay there?
4	A Oil will pour at room temperature.
5	O The kind of oil you use in these saws is thin
6	enough to properly lubricate this type of machinery?
7	A To work in the plunger. It it was too heavey
8	Q It would clog up the plunger?
9	A Right.
0	g so the difference between grease, described
1	as a glob or something and with maybe some sawdust in it,
2	or some foreign matter, would be substantially different
3	than the kind of debris that you say would fall from an
4	electric saw just as is in that exhibit?

A It depends on how much oil was applied by the use of the plunger, the man using the plunger and it would depend upon the amount of sap in a particular piece of wood he was cutting at the time and it would depend upon how constantly he was using the saw, how much heat developed there to coagulate this material, but when it fell on the deck, it would appear to be a greasy substance.

- Q But it wouldn't be grease though, would it?
- A A mixture of oil, sawdust and sap.

MR. DELANEY: I have no further questions?
THE COURT: Anything further from this

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witness?

MR. KAIN: I have nothing.

THE COURT: You may step down, thank you.

(Witness excused.)

MR. KAIN: The plaintiff in this action rests, your Honor.

THE COURT: Is there any showing as to whether the Foreman named on that Exhibit S is still in the employ?

MR. DELANEY: He lives in Brooklyn but he's retired. He's been retired for about a year and a half. C.C. Lumber is practically out of business, your Honor. The Waterfront Commission has been trying to put them out of business for a number of years. I don't think they have quite succeeded but they're virtually out business.

That explains the change in names. It's the same company.

THE COURT: At any rate, the party is not under the control of C.C. Lumber?

MR. DELANEY: No, he's not. He's available actually to anybody here who wants to call him.

THE COURT: I can draw no inference from it fairly then if he's not under the control of the party.

MR. DELANEY: Yes, he does.

THE COURT: Decision reserved. I'll try
to come to a decision very soon. I'll reserve the
issue that you talked about.

Does the third-party defendant rest?

MR.KAIN: May we reserve our motions or does your Honor wish us to make them?

THE COURT: Make all motions now because we are talking about motions that relate to the plaintiff's case.

Mr. Fodera's in the courtroom.

MR. KAIN: I would like to, if your Honor, please, reserve my motions in the principal case. I believe under the rules I'm entitled to ten days on this. I would prefer to reserve those motions for ten days. I was referring to the third-party aspects if both sides have rested.

THE COURT: Make any motions you wish.

MR. KAIN: If your Honor please, at this time, the Concord Lines, third-party plaintiff, moves for a directed verdict, on the grounds that safety and health regulations for longshoring requiring the employer in this case, C&C Lumber to eliminate teh slippery conditions as they occur.

I also, on the grounds that the competent

evidence, the credible evidence in this case shows that, the uncontradicted testimony, is your Honor, that this hatch was turned over to the C&C Lumber Company and that routine inspections were made by the Chief Officer and that these inspections fail to disclose any evidence or grease or other slippery condition on the deck and that employees of C&C Lumber Company were working in the area up to and including the time of this accident and that the nature of the work which they were doing required them to use grease on their lashings on this deck cargo which they were putting on starboard side of No. 5 hatch.

The saw they were using also required a labrication, that the ship's crew was not working in the area and that this was a holiday for the ship's crew and I submit to your Monor that on the basis of the credible evidence in this case, indeed the only evidence in this case, the conclusion is inescapable that the presence of this grease on the starboard side of Mo. 5 hatch resulted in a condition which arose or was during the control of C&C Lumber.

In that connection, I would point out to your Honor with respect to the portions of the ship's

uncontroverted testimony is that the head blocks and the blocks of this boom which were lubricated by grease were lubricated with a grease gun that they had grease fittings and that these were sealed lubrications, that is that they had, I believe, testified to a falt washer which was designed to prevent any grease from escaping out the side of the block.

I believe he said they were Timpton bears.

This grease was applied through a nipple by means of a grease gun and that this was done prior to the commencement of loading operations. I believe it was done on March 30, 1969. It is my recollection that this chief officer also testified that the oil applied to the vessels' cargo falls was applied prior to the commencement of stevedoring operations on March 30, 1969.

For that reason, the defendant contends
that the only evidence, indeed, in this case, is that
C&C Lumber breached its warranty of workmanlike
services in permitting this grease to be on the
deck and to remain there on after it was deposited.

MR. DELANEY: Your Honor, I think your Honor commented that dismissal of the claim here for

megligence, there was no evidence in this case of where or how the grease got where the plaintiff said it was and how long it had been there.

As a matter of fact, if you believe plaintiff's claim and I think you have to now because the jury has so found, that this accident happened some six feet away from where Mr. Nielsen found this grease, so we are very likely talking about two different things.

Mr. Nielsen said he found something here.

The plaintiff says he fall some other place and

described this grease as being somewhat different
than Mr. Nielsen found it.

I think the only description of what

Mr. Pampillonia said he felt what it looked like

afterwards, came from him and his witness. I think

we have to take his testimony because that's how

the jury found it.

THE CORUT: I think I'm bound by the essential elements of the plaintiff's claim. I'm not bound by his precise version as to where the grease was.

MR. DELANEY: All right. There's six feet difference, is really quite a distance.

THE COURT: That depends upon what you're

talking about. Mind you, if there was only one spot of grease shown by the evidence and the plaintiff put it in a different place, then the Captain says he found it or the crew found it, I'm not bound by the plaintiff's statement as to where he slipped.

I think, if anything, I'm required to base any verdict on a logical reading of the evidence and if there was only one spot and the jury found he fell on that one spot, then I almost am compelled to find that's where he fell, where Captain Nielsen said the grease was.

Mr. Nielsen testified as to his inspections. He also testified to the third mate, right at the next hatch when he next saw him and also at the hatch. His job was to routinely patrol the two hatches. No report was to the chief mate afterwards.

Let's assume the grease fell there immediately prior to the accident. How does that help you? Now, we are dealing with the warranty of performing the work in a workman like manner.

MR. DELANEY: In the section quoted by
Mr. Kain about cleaning up, slippery conditions
shall be eliminated as they occur. They only can

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be eliminated if you know about them and if it's been there for such a short length of time that no one can reasonably be expected to know about them or to have found them, or there's no actual notice, and it's not there lon g enough for constructive notice. You are not under obligation to clean up something which you didn't know about.

THE COURT: I don't think that regulation in any way expands the warranty that the shipowner is entitled to.

It's based on performing work in a workmanlike manner.

MR. DELANEY: Right. There's a longshoreman case called Calderola. It involved, as I recall, a longshoreman climbing up a ladder and slipping in grease, and one of the issues that have been on appeal was whether it was proper to grant or improper to grant indemnity.

They held there was no prior notice of the grease. The first person who knew was the person who slipped in it and that his employer had no notice, just slipping and falling in grease that was there, even though it could have been there for a long period of time, requires some reasonable notice or time to have discovered it or some

102 reason to be in the vicinity where it was.

THE COURT: Isn't that a little different again, than actually performing the work? If the work was negligently performed so that grease would fall on the deck, isn't that different than the failure of the employer to find the grease?

MR. DELANEY: Right.

THE COURT: There's no testimony that any C&C employees used the grease.

MR. DELANEY: In the first place, plaintiff says that up until the time of his accident, they had not lashed. He said that quite clearly it seems to me.

THE COURT: I don't know that he said it that clearly. My recollection is that he wasn't sure.

MR. DELANEY: I asked him a question to find out. I think I got a clear answer.

soon after this accident, I imagine there was some work stoppage immediately after the accident because Mr. Rina, his coworker picked him up and took him down the boat. I can't conceive of everybody else continuing to work. It was just the foreman, as I understand it and one other

aboard ship working there, so there was some lapse.

Soon after that was when the photographs were
taken. They already show a few lashers.

MR. DELANEY: It could be at least an hour and a half later. I think the chief mate's testimony on this point, when he came back after, he volunteered he walked on the offshore side, because it was safer.

He would have walked right by this crib. I asked him did he remember it being there. I asked him if he had to step over it if it was there.

He said yes. Would this have helped his recollection?

Yes. He's had time to think about something you would have time to remember to refresh your recollection. He honestly said he didn't remember it being there, probably wasn't there at 3:00 o'clock. That's in accord with the plaintiff's testimony they had not started to lash. They haven't done any lashing.

There's also no testimony that these men used any grease. I think Capt. Wheeler's testimony, if I may characterize it to the saw, it defies reason, I think that you're going to have oil, the kind of oil you use for an oil can and you have to use it on a saw and it's got this reservoir that oils it.

on the deck it's going to look like grease. If you mix oil with sawdust it doesn't make grease.

Trying to account how this grease got here,

I think, you know, strains credibility. I don't

think that shipowner here has proved his case against

this defendant. To has to prove that somehow that

that was either there, we should have known it was

there or else we put it there.

He's raised a point, it could have come from here.

It could have come from that boom just as easily
as it could have come from that lasher.

If you're putting grease into a fitting, with pressure, it can come out someplace if you put too much in there, too. If it didn't fall in the direct line, the wind could have been blowing as you can read the logbook or anything else could have happened. I wasn't there, I don't know. I don't think you can build a case on an inference on an inference on an inference.

That's what they're trying to do, to explain.

THE COURT: That's not true in the Federal

Court. All the State court lawyers cit that. If

the inference is a logical inference then you may

MR. DELANEY: Not inference on inference.

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THE COURT: Why not, as long as it's logical.

MR. DELANEY: I say it defies logic. That's the only place that we're accountable for this spot of grease when no one has seen it, no one knows where it came from.

MR. KAIN: May I point out to you --

THE COURT: The jury found it.

MR. DELANEY: They didn't have to deal with notice. The concept of how long it was there.

THE COURT: I don't think the third-party plaintiff has to deal with the notice either.

MR. KAIN: Your Honor, this was concededly

-- this hatch was finished at 11:00 o'clock. While

I don't think there's any other logical explanation

for the presence of this foreign substance, even

if we buy Mr. Delaney's argument that this was

present at 11:00 o'clock and that notice was

required, I submit to your Honor that they were

working there from 11:00 o'clock until 3:00 in the

afternoon, that that certainly would be notice

to the carpenter working inthat area which would

require them to remove any slippery substance that

was there.

the premise that there was no grease at 11:00 o/clock, if that is so, nad then if C&CLumber employees were the only ones in the area except some inspection duties performed by the crew, as indicated by Capt. Nielse, then if they are in the area and it's the sole control of the area, normally their employees were there, who else could have done it? That doesn't take much thought.

MR. DELANEY: He could have carried it on his foot. It could be the mate making his rounds. He described it as a pancake type thing. Someone could have walked around with that on his heel and picked it up on his heel and dropped it off. I don't know. This is why I say without more proof, you can't say that this was here or that we were responsible for it. Or that we put it there.

THIS COURT: Very well. I'm going to reserve decision.

MR. KAIN: Does your Honor want briefs?

THE COURT: I don't know what good that will

do, frankly. I don't want to be belating this thing.

If Cs C Lumber employees put it there in the works,

in he course of their work, then the shipowner is

entitled to recover it; if the shipowner fails to

prove that it was C&C who put it there, then, of course, they failed in their proof.

MR. KAIN: We also are entitled to contend, your Honor, they had an obligation to remove it regardless of who put it there if they were in control of the area from 11:00 a.m. to 3:00 p.m..

THE COURT: What does that mean? That's a very indefinite statements. "Slippery conditions shall be eliminated as they occur." What does that mean? Is that any different from saying that the third-party defendant must perform his work in a workmanlike manner?

MR. KAIN: It's a little different, your Holor.

If your Honor looks at 1504.3, it notes provisions

which are mandatory. You can truthfully state

it's a workmanlike manner. It seems to me it

imposes a statutory duty and these are statutes.

THE COURT: It doesn't impose a statutory duty. It's a regulation.

MR. KAIN: More than that, your Honor. I have never been involved in one, but I have read for example, where there has been a longshore accident and a man has been injured where there have been actual trials for violation of this statute in the same sense as a violation of a motor vehicle

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statute or things of that sort. 108

It makes no reference, this statute makes no reference to notice. I think it's more than that. It doesn't say to use reasonable efforts. It says unqualifiedly, "be eliminated as they occur." It doesn't say reasonable steps to eliminate as they occur. I think the conclusion is inescapable to no one else working in the area. There's no record to the contrary. Their records prove they were working in the area. The logbook which denotes the crew was on holiday and the testimony of the chief officer clearly establish nobody from the ship was working in that area at any time that day and the testimony, also, I think, is uncontroverted that by 11:00 o'clock that morning the contract stevedore had closed the hatch, covered it, put the pontoons on and departed. At that point, I don't think there's any other conclusion possible but that Court Carpentry

and its foreman and lashers took over and worked in the area. It's all good for Mr. Delaney to say only carpenters, but I would point out to your Honor there was a foreman and two lashers in this lashing gang. They certainly did something. They didn't stand around all day with nothing to do.

THE COURT: You say that this is an absolute obligation that the employer is responsible for any slippery condition, period? Whether or not created --

MR. KAIN: Unqualifiedly to remove slippery conditions as they occur and if he can't remove them, he certainly has an obligation to stop work until he has them cleaned up. Let's say for example, if the ship were bunkering and a hose ruptured and there was a sea of oil on the deck, he has an obligation nevertheless, to stop work until it's corrected or until he has it corrected.

THE COURT: Do you have any cases on that?

MR. KAIN: No, sir, I don't.

THE COURT: Is notice required?

MR. KAIN: I don't believe so.

MR. DELANEY: Presupposed notice. You can't be obligated to clean up something you don't know about.

THE COURT: You can if the statute says so.

MR. DELANEY: I don't believe the statute says so.

THE COURT: Do you have cases?

MR. DELANEY: The ice and snow case on deck.

The deck of a ship. You come aboard a ship. You

can see the ice and snow and you put down sand or

fact is that — or you can walk on a ship and there is snow there. You don't know there's ice. The snow itself isn't dangerous to work around. There are other cases, especially leaky oil from winches cases where indemnity is never granted u. . . s the condition is shown to exist and somebody has notice.

MR. KAIN: First of all, your Honor, we are assuming here, Mr. Delaney is assuming there were no supervisory employees and that if the tion exists, that he wouldn't have not any notice of it.

I don't think that the shipowner under a situation, factual situation we have hrere is required to prove a particular time of notice.

I think certainly, it's notice to him that if they were in the area as they were working from 11:00 o'clock until 3:00, the fact that a slippery condition occurred in that area during that period of time, certainly is notice to them, I think.

They have men working there. They are the only people working there. I think the only logical inference is that they actually produced this situation.

THE COURT: I don't recall the time sequence

when they stopped. I know they stopped for lunch between 12:00 and 1:00. They came back at 1:00. They were still sawing wood up until the time they were told to pick up the saw and pick up the lumber.

MR. KAIN: They were sawing right up until the time --

MR. DELANEY: That accounts for one of the lashers was sawing.

MR. KAIN: It doesn't say that.

MR. DELAMEY: I know that.

THE COURT: What exhibit should I have for this issue?

MR. KAIN: I think your Honor should have, if you are interested in the photographs, I think your Honor should have the foreman's report.

THE COURT: Cive me the exhibits and just state them for the record, please.

MR. KAIN: May we offer, your Honor, the translation of the log book rather than the log book?

THE GURT: Yes. Give me the translation.

I don't need the log book.

MR. KAIN: If your Honor please, subject to any additions that Mr. Delancy is to place in the record, I believe your Honor should have Defendant's

Photographs. Defendant's Exhibit S, which is the foreman's daily report and Defendant's Exhibit O, which is a translation of the vessel's deck log and Defendant's Exhibit Q, which is theoutbound stowage cargo plan. Defendant's Exhibit A A-1, and A-2 which are more photographs of the saw.

THE COURT: Any exhibits in the plaintiff's hands I ought to have?

MR. DELANEY: I think not.

THE CLERK; Mr. Fodera?

THE COURT: Any exhibits in the plaintiff's hands I ought to have?

MR. FODERA: No.

THE COURT: Very well. I hope to decide this as soon as possible. Maybe today or tomorrow. If I can do the little research that I want to do on it, particularly on the question of the right to use the custom and practice in the trade to determine whether C&C Lumber Company, Inc., used grease in lashing.

MR. FODERA: Your Honor, the plaintiff would like to address you, please.

THE PLAINTIFF: I want to thank you.

THE COURT: There is no reason to thank me.

112a I did my job. If you had lost, I would have felt the same way. I'm only interested in a fair trial. Good luck to you.

THE PLAINTIFF: Thank you.

(Time noted: 3:30 o'clock p.m.)

DEFENDANT'S EXHIBIT O

SHIP'S LOG

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Defendant's Exhibit O

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SPECIAL VERDICT OF THE JURY

DOMENICK PAM	191	LLONIE
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71 € 799

Plaintiff,

-against-

SPECIAL VERDICT

CONCORD LINE,

Defendant.

1.	Did defendant breach its warranty of		
	seaworthiness?	Yes X	No
	(Mark with an X)		
	(If the answer is NO, do not answer the following	question	ns)
2.	Did the breach of warranty proximately cause		
	injury to plaintiff?	Yes_X	No
	(Mark with an X)		
<u></u> .	(If the answer is NO, do not answer the following	question	ns),
3.	The amount of plaintiff's damage is	1, 80,0	00 00
4.	Was plaintiff contributorily negligent?	Yes	No_X
	(Mark with an X)		
	(If the answer to 4 is No, do not answer question 5	5)	
5.	Plaintiff was contributorily negligent to the		17
	extent of% which amounts to .	\$	
6.	Plaintiff is entitled to judgment against	•	. •)
	the defendant in the sum of	\$ 80,0	00
	(The amount stated in question 6 is the amount sta	ited in	

question 3, less the amount stated in question 5)

Dated: Brooklyn, New York December 17, 1973 Puth Miller

MEMORANDUM OF DECISION DATED DECEMBER 21, 1973

UNITED STATES DISTRICT COURT EASTERN DISTRICT OF NEW YORK

DOMINICK PAMPILLONIA,

71 C 799

Plaintiff,

-against- .

CONCORD LINE,

Defendant.

Memorandum of Decision

CONCORD LINE, A/S

Defendant and Third-Party Plaintiff,

-against-

COURT CARPENTRY & MARINE CONTRACTING CO. and INTERNATIONAL TERMINAL OPERATING CO. INC.,

December 21, 1973

Third-Party Defendants.

The jury returned a verdict in favor of the plaintiff-longshoreman and against the defendant-shipowner in the amount of \$80,000 on his claim of breach of the warranty of seaworthiness. Plaintiff claimed that on

April 3, 1969, he slipped and fell on some grease on the weatherdeck of the ship, <u>Jill Cord</u>, near hatch #5 on the starboard (off-shore) side.

Defendant-third party plaintiff claims indemnity against plaintiff's employer, C & C Lumber Co. Inc. (C.C. Lumber) through its warranty to perform the ship's carpentry work in a workmanlike manner. The third-party claim was tried to the court without a jury. The only added testimony offered in the trial of the indemnity claim was that of Captain William Wheeler, who offered his expert opinion both as to the custom and practice of a ship's carpenter in using grease in lashing down cargo and the practice he observed over the years of C.C. Lumber in using grease in lashing operations.

Third-party defendant objected to Captain Wheeler's testimony on the ground that custom and usage in the trade and custom and usage of C.C. Lumber may be offered only for the purpose of establishing a standard of conduct and may not be offered to establish a fact. Concord offered the evidence to show that C.C. Lumber used grease in its lashing operation and that the grease on which plaintiff slipped came from C.C. Lumber's grease pot or container; or

alternatively that the substance on which plaintiff slipped was a mixture of oil (used to oil the electric saw), sawdust (from the sawing operation), and sap (from the "green" $\frac{1}{2}$ lumber.

C.C. Lumber's custom of using grease in lashing operations establishes the possession of grease by their employees prior to the accident. <u>Eaton v. Bass</u> and <u>Wooden v. Hoover Motor Express</u>, 214 F.2d 896 (6 Cir. 1954); 1

J. Wigmore on Evidence, § 92 (3d Ed. 1940).

For more than two hours prior to the accident, only C 3: Lumber employees were in the area aft of the #4 hatch and in the vicinity of the site of the accident (with the exception of the presence of one of the ship's officers for a brief cursory inspection). The third-party plaintiff

C.C. Lumber cited <u>Clark v. Iceland S.S. Co.</u>, 6 A.D. 2d 544, 179 N.Y.S. 2d 708 (1st Dept. 1958). The case is impertinent. The expert opinion was "...to the effect that the absence of a lifeline between the stowed hatch covers and the ship's rail rendered the vessel unseaworthy." The opinion deals only with the propriety of expressing an opinion on the ultimate issue of unseaworthiness. <u>See Proposed Rules of Evidence for the United States District Courts</u>, Rule 704 (Opinion on Ultimate Issue) and the Advisory Committee's Note.

¹² The ship's log indicates that International Terminal Operating Co., Inc., the stevedore performing the landing operation, had finished loading the deck cargo at the #5 hatch at 11:00 A. M.

Memorandum of Decision Dated December 21, 1973

has established by a fair preponderance of the credible testimony that the third-party defendant breached its warranty to perform in a workmanlike manner by:

- placing or dropping grease in an area normally used for passage by longshoremen;
- 2. allowing the grease or other slippery substance to remain in an area used as a passageway by plaintiff and other long-shoremen, thereby creating a dangerous condition and an unsafe place to work; and
- 3. failing to eliminate a "slippery condition" as required by § 1504.91(c) of the Safety and Health Regulations for Longshoring promulgated by the United States Department of Labor.

The Clerk of the Court is directed to enter judgment in favor of plaintiff, Dominick Pampillonia, and against defendant Concord Line in the amount of \$80,000 together with costs and disbursements to be taxed, and in favor of

^{/3} 29 C.F.R. § 1504.91(c).

Memorandum of Decision Dated December 21, 1973

the third-party plaintiff Concord Line against third-party defendant C.C. Lumber in the same amount and in addition thereto reasonable counsel fees and disbursements. 4

U. S. D. J.

The parties indicated the probability of agreement on the amount due Concord Line for attorneys fees and disbursements. The court will fix a hearing on the same on application of either party.

JUDGMENT

UNITED STATES DISTR EASTERN DISTRICT OF		FILED III CLERK'S OFFICE U. S. DISTRICT COURT E.D. N.Y.
DOMINICK PAMPILLONI	A, Plaintiff,	. ★ DEC 27 1973 ★
-against-		P.M
CONCORD LINE,	,	: JUDCMENT
	Defendant.	: 71 C 799
CONCORD, A/S,		: L'FILMED
	Defendant and Third- Party Plaintiff,	
-against-		
COURT CARPENTRY & M CONTRACTING CO. and		:
INTERNATIONAL TERMI OPERATING CO., INC.		:
	Third-Party Defendants.	:
		x

A Jury having returned a verdict in favor of the plaintiff
and against defendant and Third-Party Plaintiff, Concord Line, in the
amount of \$80,000.00 and a Memorandum of Decision of Jacob Mishler,
United States District Judge, having been filed on December 26, 1973,
finding in favor of the Third-Party Plaintiff, Concord Line, and
against the Third-Party Defendants, Court Carpentry and Marine
Contracting Co., on the indemnity claim, it is

Judgment

ORDERED and ADJUDGED that judgment is entered in favor of plaintiff against defendant and Third-Party Plaintiff, Concord Line, in the amount of \$80,000.00 together with the costs and disbursements to be taxed; and in favor of the Third-Party Plaintiff, Concord Line, against the Third-Party Defendant, Court Carpentry & Marine Contracting Co., in the same amount and, in addition thereto,

Dated: Brooklyn, New York December 27, 1973

CLERK

CONSENT ORDER AMENDING JUDGMENT

UNITED STATES	DISTRICT COURT	'			
EASTERN DISTRI	CT OF NEW YORK		FILE MCLERAS S. DISTRICT CO	OFFICE URT E.D. A	TA
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DOMINICK PAMPI	LLONIA,		APR 8	1974	
	Pla	ințiff,	TREE AM		
-ag	ainst-				
CONCORD LINE,		•	71 Civ.	799	
	Def	endant.		4.	
		:			
		x	CONSENT	ORDER	
CONCORD LINE,	A/S,				
	Defendant and	Third '			
	Party Plain				
-ag	ainst-	. :			
COURT CARPENTR'		TIONAL			
TERMINAL OPERA	ring co., inc.	, :			
	Third Party De	fendants. :			
		x			

On the subjoined consent of the attorneys for the respective parties, the affidavit of WILLIAM P. KAIN, Jr., sworn to the 5th day of April, 1974, and on motion of Haight, Gardner, Poor & Havens, attorneys for defendant and third party plaintiff, it is

ORDERED, that the motion to amend <u>nunc pro tunc</u> the judgment entered in this case on December 27, 1973, in

Consent Order Amending Judgment

the form annexed hereto, be and the same is hereby granted.

Dated: Brooklyn, New York April , 1974.

U. S. D. J.

The undersigned attorneys for the respective

parties hereby consent to the entry of the foregoing order. Dated: Brooklyn, N.Y.

April 6, 1974.

AMENDED JUDGMENT

UNITED STATES DISTRICT COURT		
EASTERN DISTRICT OF NEW YORK		
	x	
DOMINICK PAMPILLONIA,	:	
Plaintiff,	:	
-against-	:	
CONCORD LINE,	:	
Defendant.	:	AMENDED JUDGMENT
	: -x	
CONCORD, A/S,	:	71 C 799
Defendant and Third	:	
Party Plaintiff,	:	
-against-	:	
COURT CARPENTRY & MARINE CONTRACTING CO., and INTERNATIONAL TERMINAL	:	
OPERATING CO., INC.,	:	
Third Party Defendants.	:	

A Jury having returned a verdict in favor of the plaintiff and against defendant and third third party plaintiff, Concord, A/S, in the amount of \$80,000.00 and a Mamor andum of Decision of Jacob Mishler, United States District Judge, having been filed on December 26, 1973, finding in favor of third party plaintiff, Concord, A/S, and against third party defendant, Court Carpentry and Marine Contracting Co., on the indemnity claim, it is

ORDERED AND ADJUDGED that judgment is entered in

Amended Judgment

favor of plaintiff against defendant and third party plaintiff, Concord, A/S, in the amount of \$80,000.00 together with the costs and disbursements in the amount of \$194.72, and in favor of the third party plaintiff, Concord, A/S, against the third party defendant, Court Carpentry & Maline Contracting Co., in the same amount and, in addition thereto, reasonable counsel fees, costs and disbursements; and it is further

ORDERED AND ADJUDGED, that the respective amounts of defendant and third party plaintiff's costs, counsel fees and disbursements may be added to the foot hereof, in sums to be agreed upon or, failing such agreement, in such sums as may be fixed by the Court.

A 271 NOTICE OF APPEAL

UNITED STATES DISTRICT COURT EASTERN DISTRICT OF NEW YORK	
DOMINICK PAMPILLONIA,	-X
Plaintiff,	NOTICE OF APPEAL
-against-	71 Civ. 799
CONCORD LINE,	
Defendant.	:
CONCORD LINE, A/S,	-x
Defendant and Third-Party Plaintiff,	:
-against-	:
COURT CARPENTRY AND MARINE CONTRACTING CO. and INTERNATIONAL TERMINAL	:
OPERATING CO., INC.,	•
Third-Party Defendants.	-X

SIRS:

PLEASE TAKE NOTICE, that the third-party defendant, C.C. LUMBER, INC., sued herein as COURT CARPENTRY AND MARINE CONTRACTING CO., appeals to the United States Court of Appeals from a memorandum decision dated December 21, 1973 and from that part of a judgment filed herein on December 27, 1973, which awards defendant and third-party plaintiff, CONCORD LINE, A/S, judgment against the third-party defendant, C.C. LUMBER, INC.,

Notice of Appeal

in the amount of \$80,000, plus reasonable counsel fees and disbursements.

DATED: NEW YORK, NEW YORK January 25th, 1974

CICHANOWICZ & CALLAN

By:

A Member of the Firm
Attorneys for Third-Party
Defendant, C.C. LUMBER, INC.,
sued herein as COURT CARPENTRY
AND MARINE CONTRACTING CO.
Office & P. O. Address
80 Broad Street
New York, New York 10004
344-7042

TO: HAIGHT, GARDENER, POOR & HAVENS, Esqs.
Attorneys for Defendant & Third-Party Plaintiff
One State Street Plaza
New York, New York 10004

FODERA, DORFMAN & FERRARI, Esqs. Attorneys for Plaintiff 50 Court Street Brooklyn, New York 11201

HUBER, KIRK & O'CONNELL.
Attorneys for Third-Party Defendant,
International Terminal Operating Co., Inc.
One Hoyt Street
Brooklyn, New York 11201

Due and timely service of Tour cepies of the within APPENDIX is hereby eduissed shie 2320 day of Juni 1975 Hought Goardner Poor + Havens Alterney 5200 APPELLER